





The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

YEAR ENDING JUNE 30, 1957



The Commonwealth of Massachusetts

REPORT

OF THE

MASS.: =
ATTORNEY GENERAL

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YEAR ENDING JUNE 30, 1957

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The Commonwealth of Massachusetts

BOSTON, December 4, 1957.

To the Honorable Senate and House of Representatives.

I have the honor to transmit herewith the report of the Department of the Attorney General for the year ending June 30, 1957.

Respectfully submitted,

GEORGE FINGOLD,
Attorney General.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL

Attorney General
GEORGE FINGOLD

First Assistant Attorney General
FRED WINSLOW FISHER

Assistant Attorneys General

SAMUEL H. COHEN	EDWARD F. MAHONY
MALCOLM M. DONAHUE ¹	CHARLES F. MARSLAND, Jr.
JOSEPH H. ELCOCK, Jr.	JOSEPH P. MCKAY ³
DANIEL J. FINN ²	GEORGE MICHAELS
SAMUEL W. GAFFER	LOWELL S. NICHOLSON
DORICE S. GRACE	ARNOLD H. SALISBURY
SAUL GURVITZ	BARNET SMOLA
MATTHEW S. HEAPHY	NORRIS M. SUPRENNANT
EDWARD J. KIMBALL	ANDREW T. TRODDEN ⁴

Assistant Attorney General; Director, Division of Public Charities
HUGH MORTON

Assistant Attorneys General assigned to Department of Public Works

VINCENT J. CELIA	MAX ROSENBLATT
FLOYD H. GILBERT	CHARLES V. STATUTI
FRANK RAMACORTI	DAVID L. WINER

Assistant Attorneys General assigned to Metropolitan District Commission

WILLIAM J. ROBINSON	JOSEPH H. SHARRILLO
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Assistant Attorneys General assigned to Division of Employment Security

LAZARUS A. AARONSON ⁵	GEORGE BROOMFIELD ⁶
STEPHEN F. LoPIANO, Jr.	

Assistant Attorneys General assigned to State Housing Board

MILTON I. ABELSON ⁷	KEESLER H. MONTGOMERY
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Assistant Attorney General assigned to Veterans' Division

FRED L. TRUE, Jr.	
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Chief Clerk to the Attorney General

HAROLD J. WELCH	
-----------------	--

Attorney
JAMES J. KELLEHER

Head Administrative Assistant
RUSSELL F. LANDRIGAN

¹ Resigned, July 31, 1956.

² Resigned, Nov. 30, 1956.

³ Appointed, Dec. 1, 1956.

⁴ Resigned, July 20, 1956.

⁵ Resigned, Jan. 15, 1957.

⁶ Appointed, Jan. 16, 1957.

⁷ Deceased, Jan. 26, 1957.

STATEMENT OF APPROPRIATIONS AND EXPENDITURES

For the Period from July 1, 1956, to June 30, 1957

Appropriations.

Attorney General's Salary	\$15,000 00
Administration, Personal Services and Expenses	297,000 00
Claims, Damages by State Owned Cars	86,970 00
Small Claims	15,000 00
Veterans' Legal Assistance	18,600 00
<hr/>	
Total	\$432,570 00

Expenditures.

Attorney General's Salary	\$15,000 00
Administration, Personal Services and Expenses	296,997 12
Claims, Damages by State Owned Cars	86,970 00
Small Claims	15,000 00
Veterans' Legal Assistance	18,599 76
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Total	\$432,566 88

Approved for Publishing.

FRED A. MONCEWICZ,
Comptroller.

The Commonwealth of Massachusetts

DEPARTMENT OF THE ATTORNEY GENERAL,
BOSTON, December 4, 1957.

To the Honorable Senate and House of Representatives.

Pursuant to the provisions of section 11 of chapter 12 of the General Laws, as amended, I herewith submit my report.

The cases requiring the attention of this department during the fiscal year ending June 30, 1957, totaling 17,801, are tabulated as follows:

Extradition and interstate rendition	137
Land Court petitions	181
Land damage cases arising from the taking of land:	
Department of Public Works	1,138
Metropolitan District Commission	193
Civil Defense	1
Department of Mental Health	2
Department of Natural Resources	18
Department of Public Utilities	1
Massachusetts Turnpike Authority	2
State Reclamation Board	1
Miscellaneous cases, including suits for the collection of money due the Commonwealth	5,069
Estates involving application of funds given to public charities	1,437
Settlement cases for support of persons in State institutions	27
Pardons:	
Investigations and recommendations in accordance with G. L. c. 127, § 152, as amended	62
Small claims against the Commonwealth	351
Workmen's compensation cases, first reports	5,807
Cases in behalf of Division of Employment Security	377
Cases in behalf of Veterans' Division	2,997

INTRODUCTION.

As I have stressed in my earlier annual reports, the scope of the work of the Department of the Attorney General is nearly as wide as the fabric of the law itself. Of course, the basic test of the interest which this department must take in a particular matter is whether the problem in any way concerns the Commonwealth or any of its agencies, but there are extremely few legal situations or procedures which cannot, in appropriate circumstances, meet that test. Consequently, as in the past, the personnel of the department has been faced throughout the fiscal year ending June 30, 1957, with the task of advising His Excellency, the General Court and its committees, and the several departments, boards and commissions of the Commonwealth, in a myriad of legal matters. More than 20,000 separate items have been disposed of in this period — some minor, many requiring no court appearances, but all of importance, in some degree, to the govern-

ment of the Commonwealth. There are very few of the governmental activities of the Commonwealth which have not, at one stage or another of their progress, been studied by this department.

Considerations of time and space forbid a detailed resumé of the flood of matters which the department has handled during the past fiscal year. However, as has been my practice in the past, I shall discuss some of them, briefly.

EMINENT DOMAIN DIVISION.

This special division of the department has from January 23, 1953, to date disposed of some 2,300 cases throughout the Commonwealth. The petitioners in these cases sought total compensation amounting to \$40,509,956.30; they were finally awarded a total of \$22,295,281.34. To the difference of \$18,214,974.96, itself representing a substantial saving to the taxpayers of the Commonwealth, should be added the interest item of \$1,252,380.19 which would have been payable had all of these matters gone to a jury trial.

As a result of an arrangement with the Chief Justice of the Superior Court, conferences and special land damage sessions have been set up in the various counties, with the presiding Justice participating in the adjustment of the cases on the trial list. By way of illustration, during a recent special land damage session in Suffolk County, ninety-five cases were completely disposed of and certificates of judgment issued. This procedure has made less necessary the hiring of real estate experts to testify, and has saved the Commonwealth over \$500,000. It has relieved, to a great extent, the congestion of the Superior Court dockets of the various counties throughout the Commonwealth.

I am grateful to the Justices of the Superior Court for their cooperation in bringing about the disposition of the great number of land damage cases which pass through this office. It is my hope that this newly established procedure will be continued, since the program of new road construction will be increased for the next thirteen or fifteen years because of Federal participation, there being allocated in Massachusetts for road construction an amount of \$840,000,000. The actual trial of every land damage case would result in court congestion and extreme delays and hardship to property owners whose properties have been taken.

It will continue to be the policy of the Eminent Domain Division to act upon all cases which come before it as efficiently and expeditiously as possible in order to minimize any inconvenience to property owners and to save the payment of interest over extended periods of time.

DIVISION OF PUBLIC CHARITIES.

This division of the Department of the Attorney General was established in 1954 (St. 1954, c. 529) on the basis of proposals made by me to the General Court. In the three years of its existence its value has been fully demonstrated. First, it affords an orderly, efficient administration of the function of the Attorney General to assure the proper and intended application of funds given or appropriated to public charity; and second,

by obtaining annual reports from all public charities in accordance with the provisions of the statute under which it was created, it provides a constant check upon these activities.

The administrative function of the division has included an immense volume of probate work of all kinds. It encompassed in the past year the examination, and approval, of over two thousand probate accounts, with assets ranging from a few hundred dollars to many millions; the examination of, and action on, petitions for appointment of trustees, for instructions, for allowance of wills, for licenses to sell, for compromise and settlement, and other matters in the usual routine of the handling of trusts and estates. Petitions for the application of *cy pres*, of which the number again increased, are in a special category, since the Attorney General is a necessary party to them and bears a particular responsibility to the courts which hear them. The division has been able, in many cases, to assist the members of the bar in their preparation and presentation of litigated matters. It is apparent that this cooperation between the bar and the division is leading to the increasing use of the doctrine of *cy pres*, with the result that idle charitable funds are being adapted to present day needs.

Representation of public charitable interests involves not only the scrutiny of administrative functions, but active participation in the protection or preservation of those interests. During the past year the division represented such interests in many proceedings before the courts.

A case of unusual interest, both from a historic standpoint, and as an example of how certain problems of charitable trusts have their origins in the distant past, was that of *Franklin Foundation v. Boston*, 336 Mass. 39, which presented the question of whether the managers of the Franklin Fund could pay current expenses of the Franklin Institute from the principal of a donation made to this fund by Andrew Carnegie, whose gift was made to "match Ben Franklin." The Franklin Fund was established under Benjamin Franklin's will and codicil, at his death in 1790. The decision of the court was that the principal of the fund could not be thus expended.

A case representative of the problems of today was presented by the will of Russell Weeks Hook, who died resident in New Hampshire, leaving the bulk of his estate to a public charitable purpose in this Commonwealth, namely, the Lowell Technological Institute. Certain heirs and legatees attacked the validity of the will in New Hampshire. Due to the participation of the division, the will was sustained and a favorable settlement was effected which secured approximately \$40,000 for the benefit of the Institute, of which Mr. Hook had been a graduate.

The value of the requirement for annual reports becomes increasingly apparent, as it reveals funds now lying idle that may properly become the subject of the doctrine of *cy pres*. It also discloses the extent to which funds are being devoted to public charitable purposes by means of inter vivos trusts and the formation of charitable corporations and foundations. This rapidly growing area of charitable trusts is one that requires careful attention now, and promises to require more as the development continues.

in the future. Annual reports, in this field, provide a factual background of obvious importance.

The cooperation of the bench and bar has been greatly responsible for the contribution made by the division. I wish again to express my deep appreciation to them, and all those who handle the affairs of charitable activities in the Commonwealth.

CRIMINAL DIVISION.

The Criminal Division of my office, which I established in 1953, has continued to function on behalf of citizens all over our Commonwealth.

Its principal function continues to be the investigation of complaints and requests for assistance from citizens and law enforcement agencies. These complaints in and of themselves take up the bulk of the time of my investigative staff, which has continued to work effectively with Federal, State and local law enforcement agencies in an effort to maintain our Commonwealth's relatively low crime rate.

Crime Commission witnesses. — On August 6, 1956, the House of Representatives adopted, in concurrence, a Senate Order adopted four days earlier, relative to the prosecution of some twenty-one persons who allegedly had wilfully failed to comply with witness summonses served upon them by order of the so-called "Crime Commission" established by c. 100 of the Resolves of 1953 and revived and continued by later enactments. This order directed the Attorney General to proceed with the prosecutions, as provided by G. L. c. 3, § 28A.

Accordingly, pursuant to said Order, evidence was presented to the Suffolk County Grand Jury in December, 1956, and indictments were returned against all twenty-one defendants.

In April, 1957, pursuant to a similar legislative Order, another indictment was sought, and returned, against another alleged recalcitrant witness.

As of June 30, 1957, these cases remained to be tried in the Superior Court for Suffolk County. These indictments were the first to be returned under said § 28A, and the trials will involve questions of law unique in Massachusetts jurisprudence.

Santos Rodriguez pardon. — On April 9, 1957, at the request of the District Attorney for the Western District, an extraordinary meeting of the Governor and Council was held for the purpose of considering the pardon petition of one Santos Rodriguez, who was then serving a life sentence for murder. The pardon grounds were that Rodriguez was completely innocent of the crime, the true murderer having since confessed and been sentenced therefor. The District Attorney assured His Excellency that there was now no question of the innocence of Rodriguez, and that his conviction had been a miscarriage of justice.

At my direction, an Assistant Attorney General forthwith advised the Governor that the safety and welfare of the people of the Commonwealth could in no measure be jeopardized by the immediate release from imprisonment of one whom His Excellency believed to be innocent of the crime for which he was sentenced; no opinion was requested, or given, as

to the effect of that provision of G. L. c. 127, § 152, which requires written recommendations on a pardon petition to be given "within not less than two weeks" following its transmission to the recommending agencies. Accordingly, a complete gubernatorial pardon was given to Rodriguez, and he was released from confinement, on the same day.

In order that there be no later question as to the definite termination of the charges against Rodriguez, his attorney thereafter filed another petition for his pardon, and on May 8, 1957, I forwarded a written recommendation to His Excellency which read, in part, as follows:

"Obviously, I cannot assure Your Excellency that Rodriguez is indeed innocent of the crime of murder. The criminal proceedings against him were conducted by the District Attorney throughout all their stages, and only he is in a position to know the facts of the case from the viewpoint of the Commonwealth. However, Mr. Moynahan's presentation of the matter to Your Excellency some four weeks ago, was sufficiently persuasive to cause the issuance of your pardon to Rodriguez at that time, and I am aware of no intervening occurrence which would cause you to change your mind as to the petitioner's innocence."

"In these circumstances, Your Excellency's duty is clear. No resident of this Commonwealth who, in your considered opinion, has been unjustly convicted of a crime in fact committed by another should be denied the executive clemency which the Constitution authorizes you to extend to him."

As of June 30, 1957, no second pardon had been given to Rodriguez.

Full Bench Decisions. — Several criminal matters were determined by the full court of the Supreme Judicial Court in which this department appeared as of counsel. Of more than usual interest were:

The three decisions redefining and clarifying the Massachusetts rule governing the right of an indigent criminal defendant to counsel. *Drolet v. Commonwealth*, 335 Mass. 382; *Pugliese v. Commonwealth*, 335 Mass. 471; *Brown v. Commonwealth*, 335 Mass. 476.

The two decisions construing the new statutory provisions dealing with "good time" deductions from criminal sentences. *Comerford v. Commissioner of Correction*, 335 Mass. 714; *Gildea v. Commissioner of Correction*, 336 Mass. 48.

In accordance with the statutes and established procedures, the division processed sixty-two references to it from the Advisory Board of Pardons of petitions for executive clemency. Each was carefully reviewed, and appropriate recommendations made.

In addition, throughout the year, a total of 137 interstate rendition matters were disposed of. In each instance where a demand had been made by some other State for the return of an alleged fugitive from justice, a hearing was accorded to the defendant, and a full report made to His Excellency.

Some fifty-seven proceedings involving extraordinary writs (mandamus, habeas corpus, writs of error, and the like) or petitions for declaratory judgments were also the concern of the division during the fiscal year 1957; these matters required the preparation of written briefs for submission to the courts, and actual court appearances and trials when necessary.

Certain criminal prosecutions undertaken by the division deserve com-

ment, but since they are still undecided by the courts I do not deem it proper, at this time, to do more than mention their existence.

EMPLOYMENT SECURITY MATTERS.

Cases on hand July 1, 1956		307
(a) Employer contribution cases		178
(b) Contract actions against Director		11
(c) Board of Review cases		9
(d) Supreme Judicial Court		2
(e) Employee Overpayment Cases		107
		—
Referrals		307
(1) Contribution cases		26
(2) Employee overpayment cases		44
		—
		70
Total cases during fiscal year		377
Cases closed:		117
(1) Contribution cases		68
(2) Overpayment cases		40
(3) Supreme Court		2
(4) Board of Review		7
		—
		117
Cases on hand July 1, 1957		260
(a) Contribution cases in process		147
(b) Board of Review		2
(c) Employee criminal cases		111
		—
		260
Total monies collected on taxes		\$48,541 91
Total monies collected — recovery on fraud collections		7,005 50
		—
		\$55,547 41

TOWN BY-LAWS.

During the year 242 by-laws and amendments to by-laws voted by the various towns in the Commonwealth were submitted to this office for approval under the provisions of G. L. c. 40, § 32. My official responsibility in these matters is far from formal. Many of them are so-called "zoning" or "protective" by-laws, which necessarily affect, presently or in the future, and for better or for worse, millions of dollars worth of real estate within the Commonwealth. I have assigned one and sometimes two of my staff to examine all such by-laws carefully before submitting them to me for action, bearing in mind, at all times, the rule of *Cohen v. Lynn*, 333 Mass. 699, 705: ". . . every presumption is to be made in favor of the by-law or ordinance and it will be sustained unless it is shown beyond a reasonable

doubt that it conflicts with the statute or the Constitution." My assistants have on more than one occasion visited the areas affected by the by-laws before making a final report to me.

Occasionally, for technical reasons, it becomes my duty to disapprove town by-laws. Before this is done, however, the local town counsel is communicated with, and usually understands and approves the action which I must take.

STATE CONTRIBUTORY RETIREMENT APPEAL BOARD.

Under the provisions of G. L. c. 32, § 16, it becomes my duty to designate an Assistant to sit, together with a designee of the Director of the Division of Accounts and a designee of the Commissioner of Insurance, upon the Contributory Retirement Appeal Board of the Commonwealth. This board has the delicate and important responsibility of adjudicating appeals by the members of the various contributory retirement systems from decisions of the local retirement boards. Subdivision (4) of the statute provides that "the contributory retirement appeal board shall pass upon the appeal, and its decision shall be final and binding upon the board involved and upon all other parties in interest, and shall be complied with by such board and by such parties." Much of the time of this board is devoted to the hearing and adjudication of applications under § 7 of said c. 32 for accidental disability retirement allowances and under § 9 for accidental death benefits. These sections in substance provide retirement allowances for members of the various systems, and for their wives and children in cases of death, where total and permanent incapacity has resulted from personal injuries sustained during the performance of public duties. Unfortunately, there have been few decisions of our Supreme Judicial Court relative to these matters, and the board has been obliged to blaze its own legal pathway. These matters are becoming so numerous and so important, however, that not infrequently they reach the Supreme Judicial Court. Several cases are presently pending and awaiting adjudication. The duty of the board, of course, is to weigh the evidence carefully and deal fairly between the member (or his dependents in the event of his death), on the one hand, and the various retirement boards, on the other.

Since the general public substantially underwrites the various public retirement systems, it is quite clear that too careful consideration of these matters cannot be given. Unfortunately, this work requires much time in the hearing of the cases, and further time in arriving at decisions, and while its responsibilities are substantial, only a very small sum of money is available for the expenses of this board. It is my feeling that an independent permanent state appeal board should be provided with ample time and sufficient money and facilities expeditiously and properly to handle the matters upon which it must pass.

STATE HOUSING BOARD.

The Assistant Attorneys General assigned to the State Housing Board continued to perform their functions. Formal and informal legal opinions

and legal advice memoranda were furnished to the board, some seventy-six title abstracts were reviewed, the several active Housing and Redevelopment Authorities were serviced, fifty-three original and refunding note issues, involving a total of \$79,078,000, were reviewed and approved, and many hundreds of conferences and hearings were attended.

MOTOR TORT CASES.

Under G. L. c. 12, § 3B, the Attorney General must in certain circumstances defend State employees operating State-owned motor vehicles. While such cases might formerly be settled for a sum no greater than \$5,000 per person for injuries or death, and a sum no greater than \$1,000 for property damage, these limits have now been raised to \$10,000 and \$5,000. Any such settlement is originally determined by the Attorney General, but must be approved by the Governor and Council.

From June 30, 1956, to July 1, 1957, a total of 216 motor tort cases were disposed of by either settlement or trial.

MENTAL HEALTH CASES.

Under G. L. c. 123, § 96, the Commonwealth has the right to bring claims against persons and estates for maintenance and support of patients in the State mental health institutions. These claims are handled by this department.

From June 30, 1956, to July 1, 1957, a total of forty-eight cases were either settled or tried, resulting in the collection of \$45,930.71 for the Commonwealth.

MALPRACTICE CASES.

Under G. L. c. 12, § 3D, the Attorney General may, in certain circumstances, defend any officer or employee of the Departments of Mental Health, Public Health, or Correction, or of the Soldiers Homes, against an action for damages for bodily injuries or infections, physical or mental agony, pain, death of any person, or any damage to property of another on the hospital grounds.

There are now two such cases pending in the Superior Court.

CONCLUSION.

The foregoing does not, of course, purport to do more than highlight a few of the many legal matters which this department has been called upon to process during the past year. The thousand-and-one routine daily tasks which their duties require the members of my staff to perform have been carried out with the same promptness and efficiency which I have come to expect of my co-workers during my years of association with them. To them go my sincere thanks for their continued loyalty to me and their dedicated service to the Commonwealth.

Respectfully submitted,

GEORGE FINGOLD,
Attorney General.

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DEPARTMENT OF THE ATTORNEY GENERAL

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OPINIONS.

State Bonds — Right of Treasurer to issue Bonds at Different Times.

JULY 2, 1956.

Hon. JOHN F. KENNEDY, *Treasurer and Receiver General.*

DEAR SIR: — You have requested an opinion as to your powers under G. L. c. 29, § 49.

Specifically, you inquire whether, the Governor and Council having requested you to issue bonds in specified amounts under a number of different statutory provisions, you must issue all of said bonds at the same time, or whether you may, in your discretion, "order three different bond sales at different times within this year."

Said § 49 authorizes you to issue bonds of the Commonwealth in such amounts and at such times as you shall determine, subject only to the requirements (1) that they shall be issued upon the serial payment plan, and (2) that the times and amounts of the issues shall be approved by the Governor and Council. Accordingly, if the Governor and Council approve your plan to issue different bonds at different times, you may legally do so.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

Revolutionary War "Bounty Note" — Right of Treasurer to pay Ancient Note.

JULY 6, 1956.

Hon. JOHN F. KENNEDY, *Treasurer and Receiver General.*

DEAR SIR: — Your recent letter requests an opinion as to whether you have authority to pay two notes, each issued during the Revolutionary War period, which have recently been presented to you for payment.

The earlier note, dated February 19, 1777, and designated as a "bounty note," is as follows:

(No. 16424)

State of Massachusetts-Bay. The 19th day of Febry — 1777.

F O R Value received for the Use of the State of

MASSACHUSETTS-BAY, I do in Behalf of said State, hereby promise and oblige myself, and Succession in the Office of Treasurer, to pay to the Possessor of this Note the Sum of TEN POUNDS, on the Sixth Day of Decem. 1780, with Interest at Six per Cent, per annum; the Interest to be paid Annually.

£10

Witness my Hand,

H. Gardner, Treasurer.

W. Cooper

N. Appleton

} Committee.

Since the answer to your inquiry is in the negative, for the reasons stated in the following paragraphs, it is unnecessary to make a determination of the validity of the note in question. But if this problem of validity were to be pursued, it is possible that serious doubts as to the present validity of the note might develop. The note itself was issued by the "State of Massachusetts-Bay," during the course of the Revolutionary War, but before the adoption of the original Constitution of the Commonwealth. Apparently it was given as a bounty for enlistment in military service. In the early years following the adoption of the Constitution in 1780, questions relating to notes similar to the one presented to you were considered by the General Court. In some instances the then Treasurer of the Commonwealth [incidentally, the first Treasurer and Receiver-General of the Commonwealth was Henry Gardner, presumably the same person who signed the 1777 note in question] was given authority to pay certain notes, or to consolidate them, or to call them in. In some of those early statutes there is reference to depreciation of notes. It was also during this period that the use of English pounds was being changed to American dollars. A more detailed study of these problems, against the background of the unexplained delay of 176 years in presenting the note, might well bring to light insuperable problems as to the existing validity of the note presented to you. But, since you must refuse to pay the note on other grounds, I have not made an extended examination of the problems mentioned in this paragraph.

The bounty note of 1777, set forth above, is an ordinary promissory note. This kind of a claim is within G. L. c. 258, § 1, by which the Commonwealth has consented that court action may be taken against it. However, from the time of the original consent to be sued, our law has provided that statutes of limitations shall be a defence to such claims against the Commonwealth. St. 1879, c. 255, § 5. In *Sturtevant v. Pembroke*, 130 Mass. 373, a claim against a town for a military bounty during the Civil War was held barred by the six-year statute of limitations. A stricter prohibition, that claims against the Commonwealth under c. 258 "shall be brought only within three years next after the cause of action accrues," was adopted in 1943. See G. L. c. 260, § 3A. "It is axiomatic that the Commonwealth can be held answerable in its own courts only to the precise extent and in the precise manner to and in which it has submitted itself to their jurisdiction by statute." *Putnam Furniture Bldg., Inc. v. Commonwealth*, 323 Mass. 179, 185. The running of the statute of limitations will bar such an action. *Chilton Club v. Commonwealth*, 323 Mass. 543, 544. The present provision permitting such actions "only within three years" is a strict condition to the action rather than a milder statute of limitations. *International Paper Co. v. Commonwealth*, 232 Mass. 7, 10. *Finn v. United States*, 123 U. S. 227. This defence or bar presented by lapse of time cannot be waived by you. VI Op. Atty. Gen. 231, 232. *Munro v. United States*, 303 U. S. 36, 41. *United States v. Trollinger*, 81 F2d 167, 168. See also *George A. Fuller Co. v. Commonwealth*, 303 Mass. 216, at 221.

I find nothing in our statutes authorizing you to pay the above note. Because of the stated policy of the Commonwealth not to permit itself to be sued on an old claim, and because you have no authority to waive such defence, it is my opinion that you would be acting without authority if you were to pay the Commonwealth's money to the present holder of the 1777 bounty note.

Although the holder of the above note cannot sue the Commonwealth,

and although you as Treasurer and Receiver General of the Commonwealth have no present authority to pay such note, the General Court itself has power by legislative act to give you such authority if it is of the opinion that the note, in the hands of the present possessor, constitutes a moral claim against the Commonwealth which should now be paid from public funds. This method of presenting claims against the Commonwealth by petition to the Legislature has always existed. It was the only method available prior to the granting of permission to sue the Commonwealth first given in 1879. *McArthur Brothers Co. v. Commonwealth*, 197 Mass. 137, 138. This method is still open to the holder of the bounty note. Upon such a petition, the Legislature, as "the keeper of the conscience of the Commonwealth" (see VI Op. Atty. Gen. 235), could determine whether or not it should authorize payment of public money for this purpose.

You also inquire as to your authority to make payment on another old note. The only description given to you of this second note is as follows:

"... it is a note for a loan for one hundred (100) pounds made by the State of Massachusetts from a Mr. William Samuel Ward in the year of 1782."

I see no way in which this note has any better standing than the bounty note of 1777. Accordingly, in the absence of facts to take the case out of the rules set forth above, it is my opinion that you are without authority to make any payment on this note.

A matter very similar to the two presented here, involving a note issued by the Commonwealth in 1794, was considered by Hon. J. Weston Allen, Attorney General, in 1921. VI Op. Atty. Gen. 231. His conclusions were that the claim was barred by the statute of limitations and that the Treasurer "should refuse to pay both the principal and the interest upon this note." I concur with the reasons and conclusions stated by Attorney General Allen. For such reasons, and for the additional reasons specified above, it is my opinion that you should refuse to pay both the principal and the interest on the two notes which have been presented to you. No payment on either note can validly be made unless there is a specific act of the Legislature instructing you to make such payment.

Very truly yours,

GEORGE FINGOLD, Attorney General.

*Logan Airport — Right of City or Town to license Taxicabs for Operation
"at Logan Airport only" — Solicitation of Business in Boston by Out-
side Taxicabs.*

JULY 11, 1956.

His Excellency CHRISTIAN A. HERTER, Governor of the Commonwealth.

SIR: — Your recent letter to me states that you have been informed by the Boston Taxi Driver's Association, Inc., that many taxicabs regularly soliciting business within the city of Boston have not been licensed to do so by the police commissioner, and that certain taxicabs doing business at the Logan Airport hold taxi licenses issued by some city or town for operation "at Logan Airport only."

You inquire:

1. Whether the regular solicitation of business in Boston by taxicabs not licensed by the police commissioner is a violation of St. 1930, c. 392, § 3.
2. Whether any city or town may properly license a taxicab for operation "at Logan Airport only."

"Regulation of the operation of vehicles used for the conveyance of passengers was an early and is a well recognized subject for local by-law or ordinance. . . . That this power includes automobiles is not open to question." *Commonwealth v. Slocum*, 230 Mass. 180, 190 (1918). All municipalities are expressly empowered by G. L. c. 40, § 22, to make such regulations. *Commonwealth v. Rice*, 261 Mass. 340, 344 (1927). See *Commonwealth v. Matthews*, 122 Mass. 60, 63 (1877), upholding regulations imposed by the city of Boston. In Boston, the matter is now specifically governed by St. 1930, c. 392, § 1, under which "the police commissioner . . . has all the power conferred upon the board of aldermen of a city by said § 22." *Burrell v. Checker Taxi Co.*, 287 Mass. 108, 113 (1934).

Under c. 392, the police commissioner has wide authority to regulate "hackney carriages" (§2). It is clear that his rules govern the operation of taxicabs. *Commonwealth v. Haydock*, 286 Mass. 47 (1934). One of the statutory prerequisites for the use of a taxicab "from place to place within the city" is that it be "licensed thereto by the police commissioner" (§ 3), and all such licenses are subject to such terms as he may prescribe (§ 4). He is authorized to promulgate rules and orders for the regulation of taxicabs (§ 1), and has done so: see "Rules and Regulations for Hackney Carriages (1954)."

There is, of course, nothing to prevent a taxicab duly licensed by another municipality from bringing a passenger into the city of Boston, even though it must pass over public ways within the city. See *Commonwealth v. Stodder*, 2 Cush. 562, 576, (1848), and annotations as to the regulation of interurban carriers in LRA 1918, 891 and 31 ALR 594 (1924). But such a taxicab cannot then legally remain in Boston soliciting business in competition with taxicabs duly licensed under c. 392. Section 3 of said chapter specifically prohibits any person "not licensed thereto by the police commissioner" from *driving or having charge* of a hackney carriage in Boston. In this blanket prohibition, these provisions differ widely from those of the Brookline by-law interpreted in *Commonwealth v. White*, 260 Mass. 300 (1927), which in my opinion does not establish any principle of law contrary to the conclusions to which I come herein. See, also, §§ 62A and 102 of c. 40 of the Revised Ordinances of the City of Boston (1947), the former as inserted by c. 3 of the Ordinances of 1951.

Section 4 of c. 392, limiting the number of taxicab licenses which the police commissioner may issue, evinces a clear legislative intent not to have more taxicabs in operation throughout the city than the maximum number therein specified. I am informed by the commissioner that the full available number of licenses has already been granted by him for the current year, so that if any unlicensed taxicabs regularly operate within the city, the legislative mandate as to said permissible maximum number is clearly being defied.

Accordingly, I answer your first question in the affirmative.

Your second question must be answered in the negative. G. L. c. 40, § 22, only authorizes municipalities to regulate vehicles *used therein*, and confers no power upon a city or town to license vehicles for use as taxicabs

"at Logan airport *only*." A taxicab duly licensed under § 22 for use as such within any town may, under the rules promulgated by the Commissioner of Airport Management (G. L. c. 90, § 50D), operate at the Logan Airport. See 1952 Rules, Rule I (7); the Boston police commissioner has no jurisdiction over airport taxicab stands. Attorney General's Report, 1942-44, pp. 47, 48. But a license to operate only outside the territorial limits of the city or town by which the grant is made is, in my opinion, an invalid exercise of the regulatory authority contained in said § 22. It would follow that such a vehicle cannot legally be operated as a taxicab at the Airport.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Officer of State Police — Retirement — Waiver of Heart Condition at re-enlistment.

AUG. 9, 1956.

HON. OTIS M. WHITNEY, *Commissioner of Public Safety.*

DEAR SIR:— You have requested the opinion of this department relative to the retirement of an officer of the Massachusetts State Police, Uniformed Branch, in the Department of Public Safety, appointed under G. L. c. 22, § 9A.

The officer has requested retirement because of physical incapacity caused by illness or injury incurred in performance of duty. The pertinent statutory provisions are in G. L. c. 32, § 26 (2) (a), which provides:

" . . . an officer of the division of state police in the department of public safety shall be retired by the state board of retirement in case the rating board, after an examination of such officer by a registered physician appointed by it, shall report in writing to the state board of retirement that such officer is physically or mentally incapacitated for the performance of duty by reason of (i), illness incurred through no fault of his own in the actual performance of duty, or (ii), an injury resulting from an accident occurring during the performance and within the scope of his duty and without contributory negligence on his part, and that such incapacity is likely to be permanent."

You advise me that all of the conditions and requirements of the above statute have been met and complied with in full, including specifically the medical examination and the report of the rating board.

The disability of the officer in question has been established to have been caused by hypertension or heart disease. Because of this, the officer claims the benefit of the presumption in G. L. c. 32, § 94, which statute provides (St. 1956, c. 580):

" . . . any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a uniformed member . . . of the state police in the department of public safety, . . . shall, if he successfully passed a physical examination on entry into such service, which examination failed to reveal any evidence of such condition, be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence."

The officer first entered the service of the Massachusetts State Police in 1928. At that time, which was the time of his "entry into such service," the officer passed a physical examination which failed to reveal any evidence of hypertension or heart disease. But on his re-enlistment in 1948, and on subsequent re-enlistments, the officer's then existing physical condition or disqualification was waived by various Commissioners of Public Safety.

Notwithstanding the strict and complete compliance with all provisions of G. L. c. 32, § 26 (2) (a), and the unrebutted presumption established by § 94 of that chapter, the State Board of Retirement denied the officer's application for retirement upon the ground that "his continued employment in the Department of Public Safety was based on waiving of the rule on physical condition required for members of the Uniformed Branch of the Division of State Police."

Upon these facts you request an opinion "as to whether or not the State Board of Retirement had any choice other than to grant him retirement as requested in accordance with the provisions of G. L. c. 32, § 26 (2) (a)."

In my opinion, upon the specific facts in this case, the State Board of Retirement should have granted the retirement. The reason assigned for refusal to grant retirement is not a valid reason. The officer, after meeting all requirements, became a member of the Massachusetts State Police in 1928. By subsequent re-enlistments he continued to be a member of that organization. The waiver of the officer's physical condition or disqualification was permitted by the provisions of G. L. c. 22, § 9A, and by the Rules and Regulations for the Government of the State Police. Technically, there was no "waiving of the rule on physical condition"; rather, the waiver was pursuant to the established rules 7.10, 7.11 and 7.12. These rules were issued under authority of G. L. c. 22, § 9A, and were duly approved by the Governor on March 5, 1951. The State Board of Retirement cannot deprive the officer of his rights because of this lawful waiver of a physical condition or disqualification.

The possibility of loss of rights because of lapse of time or for failure to report injury or claim retirement, as set forth in G. L. c. 32, § 7, does not arise in the present case since that section is not applicable here. § 7 (1); § 26 (2) (a); § 26 (4).

Since the ground for refusal by the State Board of Retirement to grant retirement is invalid, and since there appears no other error of fact or law in the proceedings for retirement or in the compliance with all statutory and regulatory requirements, the State Board of Retirement should have granted the officer's application. The Legislature has declared, by G. L. c. 32, § 26 (2) (a), that in situations of this kind the officer "shall be retired." In my opinion, upon the facts of this case, the board had no choice but to grant retirement.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Contract for Public Building — Bidding Procedure — Work to be done by City.

AUG. 23, 1956.

Hon. ERNEST A. JOHNSON, *Commissioner of Labor and Industries.*

DEAR SIR: — You have asked for an opinion concerning the interpretation of the statute relating to the bidding procedure on public building contracts as set forth in G. L. c. 149, §§ 44A-44D, as amended by St. 1954, c. 645. You make reference to the specifications relating to construction of a housing project in Lynn, Massachusetts, wherein the following language appears in the specifications for the plumbing subcontract under Division 20-3 (d) (1):

"WORK EXCLUDED FROM THIS DIVISION

(d) *City of Lynn Water Department*

(1) Furnish and install a new water service pipe from the water main in Fayette Street up to and including the 2-inch master water meter in the building, as indicated on the drawings. The Plumbing Contractor shall pay the City of Lynn Water Department any fees or charges for all work done by the City of Lynn in connection with the water service. All underground water piping up to the meter shall be Type K copper tubing with cast or wrought copper sweat joints, as specified hereinafter."

You state that the low bid for the plumbing subcontract made no reference in its bid to the work to be done by the Lynn Water Department, and you ask whether such work should have been listed on the bid form for subcontractors as a sub-subcontractor.

If a subcontractor intends not to perform some of the work listed in the plumbing specifications but intends instead to have it performed by another contractor, such other subcontractor should be listed on the bid form for subcontractors under section (b). An examination of the language in the specifications quoted above indicates that the work to be performed by the Lynn Water Department was work excluded from the plumbing division. It is also clear from the language that the plumbing subcontractor has the obligation of paying any fees to the Lynn Water Department. It would appear, therefore, that any such fees must be included in the subcontract bid for the plumbing work but that the city of Lynn need not be listed as a subcontractor.

In reference to the same plumbing subcontractor you refer to Division 20-13, which relates to exterior storm and sanitary drainage systems. Section (g) thereof provides as follows:

"All storm and sanitary sewer pipe work located inside the limits of the project property lines shall be performed by Licensed Plumbers; all pipe work located outside the project property lines shall be done by City of Lynn Licensed Drainlayers in the Plumbing Sub-Contract."

You state that the plumbing subcontractor has not listed a city of Lynn licensed drainlayer as a sub-subcontractor and that such work will probably be done by an employee of the plumbing subcontractor, who is also a city of Lynn licensed drainlayer. In view of the fact that the work is actually

to be performed by a properly licensed drainlayer, as called for by the specifications, it would appear that the foregoing procedure is in accordance with such specifications. There appears to be no legal objection apart from the bid statute which would prevent the plumbing subcontractor from employing such a drainlayer.

In summary, it is our opinion, in reference to your first question, that the Lynn Water Department need not be listed as a sub-subcontractor, and it is our further opinion, in connection with your second question, that a city of Lynn licensed drainlayer need not be listed as a sub-subcontractor.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By JOSEPH H. ELCOCK, Jr.,
Assistant Attorney General.

Contract for Public Building — Bidding Procedure — Separate Subbids.

AUG. 24, 1956.

Hon. ERNEST A. JOHNSON, *Commissioner of Labor and Industries.*

DEAR SIR:— You have asked for an opinion concerning the interpretation of the statute relating to the bidding procedure on public building contracts as set forth in G. L. c. 149, §§ 44A-44D, as amended by St. 1954, c. 645.

You state that specifications relating to construction of the Lynn Housing Project contain in Division 10 specifications calling for a subbid on "Roofing and Sheet Metal" and that, by Addendum No. 1, Division 10-A was established calling for an additional subbid for "Asphalt Shingle Roofing." You ask whether separate subbids on these two items may be called for by the specifications or whether all such roofing must be included in one subbid.

General Laws c. 149, § 44C (A) 2, provides as follows:

"2. Each bid shall be divided into two items:—

"Item 1, covering all the work of the general contractor, being all work not covered in item two.

"Item 2, covering the work and the bid prices therefor of the subcontractors for such of the following as in the estimate of the awarding authority shall exceed one thousand dollars: (a) roofing and flashing; (b) metal windows; (c) waterproofing, dampproofing and caulking; (d) miscellaneous and ornamental iron; (e) lathing and plastering; (f) acoustical tile; (g) marble, tile and terrazzo; (h) resilient floors; (i) glass and glazing; (j) painting; (k) plumbing; (l) heating, ventilating and air conditioning; (m) electrical work; (n) elevators; and (o) the work of any other principal or minor subcontractors for which the awarding authority deems it necessary to receive filed sub-bids; and each of these classes of work shall be designated in item two of the bid form for general contractors as classes of work for which bid prices from subcontractors must be given."

An examination of the foregoing provision indicates that subbids shall be called for in connection with roofing and flashing when bids are sought in connection with the construction of public buildings. It appears that

such subbids were included in the specifications. The only difficulty appears to be that two separate subbids for roofing work have been called for under Division 10 and Division 10-A mentioned previously. The language of the statute quoted above does not appear to have any mandatory requirement that all such roofing and flashing should be done by one subcontractor. In summary, it is our conclusion that the specifications as they relate to the work on roofing and flashing are not inconsistent with the applicable bid statute.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By JOSEPH H. ELCOCK, Jr.,
Assistant Attorney General.

Civil Service — Police Officer — Notice of Hearing Relative to Discharge — Notice to Mentally Ill Person.

AUG. 29, 1956.

Commissioners of Civil Service.

GENTLEMEN:— You have requested an opinion as to whether or not a patrolman in the Boston Police Department who is discharged was given proper notice in connection with the hearing relative to his discharge.

The statute involved is G. L. c. 31, § 43. This statute provides that before the discharge of an employee from public office in the classified civil service he "shall be given a full hearing before the appointing authority, of which hearing he shall have at least three days' written notice."

In the case which you present the patrolman was temporarily suspended in 1953, and at that time notice was given to him of a public hearing as required by the above section. Because the charges against the patrolman were pending in the courts, the hearing before the appointing authority was continued from time to time until disposition of the court case. This occurred in June of 1956. Notice was given on June 27, 1956, to the patrolman of a hearing to be held before the appointing authority under c. 31, § 43, to begin on July 5, 1956. The hearing was held from July 5 to July 9. The decision ratifying suspension was made on July 10.

The question as to the validity of the notice to the patrolman is based upon the fact that in 1954 he had been placed under guardianship by the probate court as a mentally ill person, and that this was his status during the hearing in July, 1956. With reference to this matter your hearing officer has found the following facts:

"(1) Upon all the evidence before me, I find that the Employee, a mentally ill person, had been placed under guardianship February 4, 1954, by the Suffolk Probate Court, Boston, Massachusetts, and had not been removed from this disability at the time of the hearing before the Appointing Authority;

"(2) Upon all the evidence before me, I find that the Appointing Authority had knowledge of said guardianship at the time of the hearing before him;

"(3) Upon all the evidence before me, I find that notwithstanding this knowledge, the Appointing Authority refused to continue the hearing or to notify the guardian."

However, it appears from the transcript of evidence before the hearing officer (p. 11) that during such hearing before the appointing officer the patrolman "was present and was represented by counsel and pleaded not guilty." Upon the above facts you request an opinion as to whether or not the patrolman was given proper notice of hearing.

In my opinion, the proper notice was given to the patrolman. The statute requires that notice be given to the employee (§ 43). This section makes no reference to an employee who is mentally ill and is under guardianship. There is no statutory provision in our laws with respect to the service of notice upon a guardian of a mentally ill person. In passing upon similar provisions for the service of process in civil cases, under G. L. c. 223, § 29, which calls for service upon the defendant, our courts have held that such service must be upon the defendant in person even though he is mentally ill, and that a service upon the guardian and no service upon the defendant in person is an invalid service. This rule has recently been applied in connection with the notice of hearing on probate accounts under G. L. c. 201, § 25, with rulings that absence of service upon the party interested, even though insane, rendered the proceeding void, and service solely upon the guardian of such person did not validate the proceedings. *Taylor v. Lovering*, 171 Mass. 303, 306. *Anagnostopoulos v. Anagnostopoulos*, 307 Mass. 493, 494-495. *Burnett v. Williams*, 323 Mass. 517, 520, 521. *Reynolds v. Remick*, 327 Mass. 465, 469.

In the present case, it is to be noted that the original service of notice for the earliest scheduled hearing was made upon the patrolman prior to his disability. The hearing in 1956 was a continuance of that earliest scheduled hearing. Furthermore, at the 1956 hearing the patrolman was present at the hearing in person and was represented by counsel. Notices for both the 1953 hearing and the 1956 hearing were delivered to the patrolman as required by the statute. Under these circumstances the notice required by G. L. c. 31, § 43, was given, and the appointing authority had jurisdiction to proceed with the hearing.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

State Employee — Accidental Disability Retirement — Effective Date of Retirement — Commencement of Payments.

AUG. 30, 1956.

Hon. JOHN F. KENNEDY, *Chairman, State Board of Retirement.*

DEAR SIR: — You have requested an opinion regarding the rights of a State employee to accidental disability retirement under the provisions of G. L. c. 32, § 7.

You present the following facts:

An employee of the State Quartermaster's department of the Commonwealth was injured in September of 1952, and such injuries resulted in total incapacity. On August 26, 1955, the employee filed an application

for accidental disability retirement under G. L. c. 32, § 7, and requested that he be retired as of October 31, 1955. Your board has (1) found that all conditions for allowance set forth in § 7 have been met, (2) approved the application, (3) established September 2, 1955, as the date of retirement, and (4) fixed December 28, 1955, the day after the employee's name last appeared on the State payroll, as the date when retirement payments are to begin.

Your request for my opinion is as follows:

"The board respectfully requests your formal opinion as to whether or not it is within the province of this board to approve the application so as to have the retirement effective as of September 2, 1955 and the retirement allowance effective as of December 28, 1955."

This opinion is restricted to the specific question asked. Except for the question asked, I understand from you that the employee meets all of the requirements of § 7.

In the first place, the beginning of retirement payments on December 28, 1955, the first day after "he last received regular compensation for his employment in the public service," is required by subdivision (2) of said § 7. This subdivision relates to the date retirement payments shall start, not to the effective date of the retirement itself.

The date of September 2, 1955, fixed by your board as the effective date of retirement, is the latest date possible. Any later date would place the retirement within the prohibited period of "two years prior to attaining the maximum age." § 7 (1). In passing upon the validity of the date of September 2, 1955, the date selected by your board, consideration must be given to three other dates suggested by the statute: September 10, 1955, which is the date fifteen days after the filing of the application; December 28, 1955, the date when retirement payments were to begin; and October 31, 1955, the date indicated by the employee as the time he desired to be retired.

September 10, 1955 — The provision in § 7 that the employee "shall be retired . . . as of a date . . . which shall be not less than fifteen days . . . after the filing of such application," in my opinion, is directory rather than mandatory. This general subject was considered in *Boston v. Barry*, 315 Mass. 572, and the court stated at page 578:

"A statute 'imperative in phrase,' prescribing the time or manner of performance by a public or corporate officer of an act not intended for the benefit of a person in the position of the party attacking its validity, is ordinarily construed as a merely directory provision for the orderly and convenient conduct of business, and compliance with it is not a condition of the validity of the act."

December 28, 1955. — The date of the retirement itself and the date when a retirement allowance is to be paid are entirely distinct. The former is covered by subdivision (1), the latter by subdivision (2). Payment may and sometimes must begin within the two-year period before maximum age. But the day of payment has no bearing upon the date "as of" which the retirement takes place.

The conclusions of law stated above are included in my opinion to you dated April 25, 1956. (Attorney General's Report, 1956, pp. 87, 89.) See that opinion for further explanation of the above principles.

October 31, 1955. — Subdivision (1) of § 7 also provides that an employee "shall be retired . . . as of a date which shall be specified in such application." Again, it is my opinion that this provision is directory and not mandatory. I do not believe that the Legislature could have intended to bar payment of accidental disability retirement, to which a State employee was otherwise fully entitled, because the employee in an application filed more than two years prior to maximum age suggested that the retirement be effective at a date within such two-year period.

In conclusion, and for the foregoing reasons, it is my opinion that your board acted within its powers in fixing September 2, 1955, as the effective date of the retirement and in providing for payments to begin on December 28, 1955.

Very truly yours,

GEORGE FINGOLD, Attorney General.

General Court — Travel Expenses of Members of General Court — Adjournment or Recess — "Informal" Sessions.

SEPT. 25, 1956.

Hon. JOHN F. KENNEDY, Treasurer and Receiver General.

DEAR SIR: — You have requested the opinion of this department relative to the travel expenses of members of the General Court.

Your statement of the facts and of your inquiry is as follows:

"On August 10th, it was announced that the General Court would be in recess from August 10, 1956, to September 25, 1956. A number of members have presented vouchers for payment of travel and I desire to know whether or not under St. 1953, c. 263, payment can be made for such members' attendance upon the General Court."

Your authority to pay members of the General Court for their travel expenses, or for their expenses of travel, lodging and meals, is contained in G. L. c. 3, § 9B, added by St. 1953, c. 263. This provides that "for each day of attendance upon the general court" a member is entitled to his expenses as set forth in this section. You are given authority by the section to make payments upon a voucher in which a member "certifies that he travelled daily as above specified or travelled and incurred expenses for lodgings and meals daily as above specified." If there was actual attendance at a session of the General Court, and if the proper voucher is submitted to you, you are authorized to pay the expenses as provided for in § 9B.

The problem you present raises a question as to the existence of constitutional sessions of the General Court between the dates of August 10, 1956, and September 25, 1956. During this period you state that the General Court is "in recess." Technically, there have been "adjournments" of each branch of the Legislature during this period, but no "recess." The orders for adjournment are set forth in the Journals of August 10, 1956. Senate Journal, pages 1651, 1673. House Journal, page 2261. These adjournments were in accordance with the provisions of the Massachusetts Constitution giving each house the power to adjourn

themselves, "provided such adjournments do not exceed two days at a time. The Legislative Power, c. I, § II, art. VI and § III, art. VIII. The adjournments, informally but incorrectly referred to as a recess, have not been taken under an order of the Governor and Council (c. II, § I, art. VI), nor by concurrent vote of both houses under article LII of the Amendments to the Constitution.

The adjournments of each house, beginning on August 11, 1956, have been followed by constitutional sessions of each branch of the General Court on each Monday and Thursday. Although these sessions have been "informal," without prosecution of the usual business, and as a part of a general plan for adjournments or a "recess" until September 25, 1956, such "informal sessions" on each Monday and Thursday have been constitutional meetings of each branch of the General Court.

Because each session of the General Court during this period of repeated adjournments has been a valid and constitutional session, members who have actually been in attendance at any such session are entitled to payments of expenses under G. L. c. 3, § 9B.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Board of Registration in Medicine — Alien Physician — Rescission of Order.

Oct. 5, 1956.

MR. ROGER T. DOYLE, *Chairman, Board of Registration in Medicine.*

DEAR SIR:— You have inquired concerning the right of your board to issue a second license to Dr. Herbert Penuel Falkner Corbin of Adams. I understand that he has not been able to file proof of citizenship within the five years mentioned in G. L. c. 112, § 2, but that such final citizenship papers will be granted to him in about a month.

I have examined the various provisions of law relating to this situation. Even though it were ruled that you had a right to issue a second "courtesy license" to Dr. Corbin, such a new license would have to be preceded by an application and an examination. This procedure might take such a length of time that it would cause unnecessary suffering to the doctor's patients in Adams. Because of the inevitable delay under such procedure, and because the question of a second license under this paragraph of § 2 has never been passed upon, I am not answering the specific question you have asked but am calling your attention to another procedure which will accomplish the same result.

Although your board has already entered an order of revocation of the doctor's license, you have authority to rescind such order of revocation and to give the matter further consideration. The revocation or cancellation called for in § 2 is not automatic, and the law does not require such revocation if the purpose of the statute, that is, final securing of citizenship, is accomplished. Under this statute, your board has authority to exercise discretion and to take such action in the matter as would be reasonable

under all the circumstances. Even a delay of a few weeks in taking final action on the matter of revocation, until the official citizenship papers are received, would be legal. The phrase "shall be revoked" in this statute does not require automatic or instantaneous action by the board. *Boston v. Barry*, 315 Mass. 572, 578. *Smith v. Director of Civil Service*, 324 Mass. 455, 458-459. *Selectmen of West Springfield v. Hoar*, 333 Mass. 257, 260.

Accordingly, it is my suggestion that instead of making a study of the matter of issuing a second "courtesy license," you consider the matter from the point of view of rescission of the outstanding order of revocation, and a consideration of the needs of Dr. Corbin's clients and the fact that he will become an American citizen within a few weeks.

Very truly yours,

GEORGE FINGOLD, Attorney General.

Statutes — Approval of Bill by Governor After Prorogation of General Court.

OCT. 18, 1956.

Hon. EDWARD J. CRONIN, *Secretary of the Commonwealth.*

DEAR SIR:— You have requested an opinion regarding House Bill 690 (changed), which is entitled "An Act relative to assessments upon cities and towns served by the New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority in the event of a deficit in the cost of service of said Authority, and providing for continuous service throughout the year."

You present the following factual situation: "House Bill 690 (changed) was engrossed in both branches of the General Court on October 5, 1956, and laid before His Excellency, the Governor, for his approbation on October 6, 1956. The General Court was prorogued at 5:46 P.M. on Saturday, October 6, 1956. At the time of prorogation this measure was before His Excellency. On Thursday, October 11, 1956, this measure was signed by Governor Herter and was transmitted to this office where it was received at 5:15 P.M. the same day."

You further state: "A search of precedents indicates that no measure has been approved by a governor and filed in this office after the prorogation of the General Court since the effective date of Article I of the Amendments to the Constitution, June 5, 1821."

Upon the above facts, you request an opinion on the following question:

"Should House Bill 690 (changed), approved by His Excellency, the Governor, on October 11, 1956, the fifth day following the prorogation of the 1956 session of the General Court, be given a chapter number and published as a law of the Commonwealth?"

I answer your question in the affirmative.

The Massachusetts Constitution provides (pt. 2nd, c. I, § I, art. II) that no bill shall become law "until it shall have been laid before the governor for his revision"; and also that the Governor shall return a bill to the Legislature, if he objects thereto, within five days. This article gives the Governor five days within which to approve a bill. *Opinion of the Justices*, 291 Mass. 572.

There is nothing in the Massachusetts Constitution which states or implies that the above five-day period is shortened if the Legislature prorogues before the end of such period. The duty of the Governor to study a bill and to consider whether he will approve it or veto it is a vital and historical part of our constitutional procedure for the adoption of laws. The Governor is entitled to the full five days in which to approve or disapprove a law. If it were to be ruled that the Governor could not approve a law, which was presented to him later than five days before prorogation, unless he acted on it in less than five days, he would effectively be deprived of the five days given to him by the Constitution for consideration of the matter. Although this precise question has not been adjudicated in Massachusetts, our Supreme Judicial Court has clearly stated that this five-day period for consideration and approval of enacted bills "cannot be lessened, directly or indirectly, by the Legislature." The court stated, in *Tuttle v. Boston*, 215 Mass. 57, 59-60, as follows:

"The duty of revisal of acts passed by the legislative department of government, which is vested by the Constitution in the Governor, is a personal duty. It must be performed by him alone, and cannot be delegated. It is a high prerogative. . . . It is a power conferred by the Constitution itself. It cannot be narrowed or cut down in any respect by the legislative department. The time within which it is to be exercised under the Constitution cannot be lessened, directly or indirectly, by the Legislature."

In *Opinion of the Justices*, 291 Mass. 572, 576, in commenting upon the "brief time allowed to the chief executive of the Commonwealth with respect to the revisal of measures adopted by the legislative department of government," the court again stated:

"The time allotted to him by the Constitution for the performance of that weighty duty cannot be abbreviated or lengthened by the legislative department of government."

That our court will follow this rule even in the case of prorogation of the Legislature prior to the expiration of the five-day period seems to be indicated by the case of *Galligan v. Leonard*, 204 Mass. 202, 205. In that case, which dealt with the approval or disapproval by a mayor of a measure presented to him by the city council two days before its final adjournment, the court stated:

"The statute gives to the mayor the specific time of ten days within which to decide whether he will approve or disapprove a given measure. It cannot have been the intent of the Legislature to put it in the power of the city councils to shorten this definite period or to compel the mayor to exercise these important prerogatives under the pressure of the closing hours of his term of office, without the time necessary to do so intelligently."

There is no Massachusetts decision holding that the Governor cannot approve a bill after prorogation. The *Opinion of the Justices*, 3 Mass. 567, states that a bill or resolve laid before the Governor less than five days before prorogation, and not signed by the Governor, does not have the force of law. The questions considered in such opinion were specifically limited to bills and resolves which were not approved by the Governor.

Nor is there any provision in the Massachusetts Constitution which

prevents approval by the Governor after prorogation. The provision of Art. I of the Amendments to the Constitution, that a bill which is presented to the Governor within five days of adjournment and is not approved shall not become a law, is limited to bills and resolves which "shall be objected to, and not approved by the governor." Such amendment has no application to a bill which is signed and approved by the Governor within the five-day period.

On the other hand, a ruling was made by Attorney General Knowlton, in 1894, that the Governor may approve bills even after prorogation. I Op. Atty. Gen. 168. This opinion has stood without criticism for many years. The careful opinion expressed there that the Governor has authority to approve a bill after prorogation may by this time be deemed to have been accepted and to have become a part of our constitutional law.

My affirmative answer to your question is in accord with the established rule of law applicable to the Federal Constitution. The provisions of the United States Constitution (Art. I, § 7, cl. 2) are the same, for the purposes of this problem, as the Massachusetts provisions cited above. This identical problem, but with reference to the right of the President of the United States to approve a bill after the final adjournment of Congress, was decided in favor of such right in *Edwards v. United States*, 286 U. S. 482. Various legal and theoretical objections to this conclusion were considered by the Supreme Court of the United States, and were overruled. In its conclusion, the court stated (pages 492-493):

"There is nothing in the words of the Constitution which prohibits the President from approving bills, within the time limited for his action, because the Congress has adjourned; and the spirit and purpose of the clause in question forbid the implication of such a restriction. The provision that a bill shall not become a law if its return has been prevented by the adjournment of Congress is apposite to bills that are not signed, not to those that are signed. . . .

"Regard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him. The importance of maintaining that opportunity unimpaired increases as bills multiply. . . . No possible reason, either suggested by constitutional theory or based upon supposed policy, appears for a construction of the Constitution which would cut down the opportunity of the President to examine and approve bills merely because the Congress has adjourned."

For later Federal decisions to the same effect, see *United States v. Kapsalis*, 214 F.2d 677, and *United States v. Pruitt*, 121 F.Supp. 15, affirmed at 217 F.2d 648. Certiorari was denied in these two cases: 349 U. S. 906, 907. See also, treatise on "The Veto Power of the President," by Charles J. Zinn, 12 F. R. D. 207, at pages 226-228.

The fact that the Governor, with the advice of the Council, may delay the time of prorogation (Mass. Const., pt. 2nd, c. II, § I, art. V) — in this respect the Massachusetts situation is different from that of the Federal Government since the President's approval is not necessary to the adjournment of Congress (U. S. Const., art. I, § 7, cl. 3) — does not affect the present question. In the first place, if this power to delay prorogation were to be used to obtain the full five-day period for study of a bill by the Governor, then prorogation could never be said to "prevent his returning

it with his objections," and art. I of the Amendments of our Constitution would be unnecessary. Furthermore, if prorogation were delayed for such purpose, the enactment of new bills during that period of delay would be valid as well as probable, thus calling for another delay, and then still more bills, without end. Finally, and most importantly, the power to delay prorogation is immaterial because the Governor's right to a full period of five days to consider bills is a constitutional right he has, not as a constituent part of the Legislature, but entirely independent of and apart from the Legislature. He is entitled to this period of five days irrespective of his legal or practical power to delay prorogation. This dominant nature of the Governor's power to approve a bill and his right to hold the bill for a full period of five days of study is implicit in all the decisions cited above.

For the reasons above stated, you are hereby advised that House bill 690 (changed), enacted by the Legislature on October 5, laid before the Governor on October 6, prior to prorogation of the General Court on that day, and approved by the Governor on October 11, 1956, has the force of law and should be given a chapter number and published as a law of the Commonwealth.¹

Very truly yours,

GEORGE FINGOLD, Attorney General.

Mentally Ill Person — Commitment by Doctor in Military Service.

OCT. 30, 1956.

JACK R. EWALT, M.D., *Commissioner of Mental Health.*

DEAR SIR:— You have requested an opinion of this department relative to the right of doctors in military service to sign admission papers for mentally ill persons in need of temporary care. The facts which you present and your inquiry upon such facts are as follows:

"The Department of Mental Health has been asked to learn whether doctors in military service have the right to sign papers for the admission of a mentally ill person under the provisions of G. L. c. 123, § 79. Most of these physicians do not have a license to practice medicine in the State of Massachusetts. They are here for a short time on military assignment. Occasionally one has practiced in Massachusetts and is licensed, in which case there is no question of his legal ability to sign this paper.

"Public Law 569 of the 84th Congress, entitled 'Dependents' Medical Care Act,' was passed and signed June 7, 1956, and becomes operative on December 8, 1956. Under this law dependents are entitled to receive medical care, the same as military personnel. The question is raised: Can the military doctors, without a state license, sign the admission papers under G. L. c. 123, § 79? In both instances, the hospitals of the military installations in Massachusetts do not have accommodations to care for patients who are acutely, mentally ill.

"Section 79 of G. L. c. 123 states that the physician shall be a graduate of a legally chartered medical school, shall be registered in accordance with c. 112, or shall be a commissioned medical officer of the United States

¹ A similar ruling, citing the above opinion, was made by the Supreme Judicial Court on November 9, 1956. *Opinion of the Justices*, 334 Mass. 765, 770.

army, navy or public health service acting in performance of his official duties. The question is: Is the signing of a commitment paper for the admission of a patient, military or dependent military, to one of the State mental hospitals, performance of official duties, and can this paper be signed legally by a physician who does not hold a license to practice medicine in Massachusetts?"

Under G. L. c. 123, § 79, as most recently amended by St. 1956, c. 589, § 5, a person in need of immediate care because of mental derangement can be received and cared for in an institution for the insane for a period not exceeding ten days upon request made to the superintendent or manager of such institution by a "physician," and by certain other persons. The statute identifies the "physician" who may make such a request in the following way:

"The physician shall be a graduate of a legally chartered medical school, shall be registered in accordance with chapter one hundred and twelve, or shall be a commissioned medical officer of the United States army, navy or public health service acting in the performance of his official duties . . ."

Even though a physician does not comply with the first two requirements of the above quotation, he may lawfully request such temporary care of an insane person if he is "a commissioned medical officer of the United States army, navy or public health service acting in the performance of his official duties."

Your specific question is as follows:

"Is the signing of a commitment paper for the admission of a patient, military or dependent military, to one of the State mental hospitals, performance of official duties, and can this paper be signed legally by a physician who does not hold a license to practice medicine in Massachusetts?"

This question must be considered in two parts, first, with reference to military patients, and second, with reference to dependents of members of the military forces. With reference to persons in the military forces or retired therefrom, I assume that their entitlement to medical care is broad and inclusive and would include, in the proper case, a request for temporary care of such person in an institution for the insane. As to such persons, a doctor in the military service would be acting in the performance of his official duties to request such temporary care, and accordingly such medical officer would be authorized to make such request under c. 123, § 79. The situation would be different in regard to a dependent of a member of the military forces. You call my attention to Public Law 569 of the 84th Congress, entitled "Dependents' Medical Care Act." I know of no other statute under which a dependent of a member or retired member of the military forces is entitled to professional services of a medical officer of the United States army, navy or public health service. Unless this cited act entitles dependents of persons in the military forces to such professional services, then a doctor in the military service would not be acting in the performance of his official duties in requesting the temporary care of such a dependent. I note that section 103 (f) (of the "Dependents' Medical Care Act") does not include the treatment of mental disorders. I note that section 103 (g) (2) of such act provides that "hospitalization under this section is not authorized dependents for . . . mental disorders . . . except that the Secretary of Defense, after consultation with the Secretary

of Health, Education, and Welfare, by regulation, may provide in special and unusual cases for hospitalization of not to exceed twelve months for dependents for such disorders. . . .”

Since the above cited Federal act does not authorize medical care or hospitalization to dependents for mental disorders, except in the special and unusual cases referred to in the act, it is my opinion that a doctor in the military service is not “acting in the performance of his official duties” in requesting temporary care under G. L. c. 123, § 79, for a dependent of a member or retired member of the military forces. Accordingly, unless such medical officer complies with the other portions of § 79, he is not such a person as may request temporary care under this statute.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Division of Waterways — Flood Relief Act — Obtaining Indemnity Bond.

Oct. 31, 1956.

Mr. RODOLPHE G. BESETTE, *Director, Division of Waterways, Department of Public Works.*

DEAR SIR: — You have asked whether the so-called Flood Relief Act embodied in St. 1955, c. 699, requires the filing of an indemnity agreement by a city or town relating to waterway work done by the department under authority of the Flood Relief Act.

My answer is in the negative. Such an indemnity agreement is not required by any particular provision of the Flood Relief Act itself. As far as other provisions of law are concerned, indemnification agreements from cities and towns relating to harbor improvement work are authorized by G. L. c. 91, § 29, which provides as follows:

“A county or town may appropriate money for the improvement of tidal and non-tidal rivers and streams, harbors, tide waters, foreshores and shores along a public beach within its jurisdiction, and the money so appropriated shall be paid to the state treasurer and be expended by the department for said purposes within the limits of such town; and the town may also assume liability for all damages to property suffered by any person by any taking of land, or of any right, interest or easement therein, within the town made by said department for the purposes hereinbefore authorized.”

The statute does not require that such an indemnification agreement be filed but merely authorizes the execution of such agreement. You state that the Division of Waterways customarily requires the filing of such agreement prior to commencing work on waterways. Such action on the part of the division is a matter of policy and, in the absence of other special provision, does not appear to be required as a matter of law.

In relation to waterway projects under the Flood Relief Act, it is not required as a matter of law that indemnification agreements be filed by cities and towns. Within its discretion, however, the Commonwealth may ask for such agreements and may refuse to undertake the projects unless the agreements are filed.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOSEPH H. ELCOCK, Jr.,
Assistant Attorney General.

State Employees' Group Insurance Commission — Delegation of Powers.

Nov. 1, 1956.

Mr. WILLIAM A. BURKE, *Executive Secretary, State Employees' Group Insurance Commission.*

DEAR SIR:— You have asked for an opinion concerning the authority of the State Employees' Group Insurance Commission to delegate certain duties to the chairman or executive secretary of the commission.

You state first that the commission has awarded a three-year insurance contract calling for monthly payments by the Commonwealth to an insurance company, such payments being determined each month by the number of employees then in the employ of the State. You ask the following question:

"May the commission by vote, authorize the chairman, or the executive secretary to sign the subsequent monthly vouchers since that is only a ministerial duty depending on the particular number of employees covered for that particular month?"

The answer to your question is in the negative. There are two statutory provisions which appear to require this conclusion. The first is G. L. c. 32A, § 8 (c), providing in part as follows:

" . . . The commission, from funds appropriated therefor, shall authorize payment of the contribution of the commonwealth as provided in said paragraphs (a) and (b), which, together with the employee payments, shall be paid at least once each month to the carrier or carriers entitled to the premium."

The second is G. L. c. 29, § 20, providing that:

"No account or demand requiring the certificate of the comptroller or warrant of the governor shall be paid from an appropriation unless it has been authorized and approved by the head of the department, office, commission or institution for which it was contracted; nor shall any appropriation be used for expenses, except gratuities and special allowances by the general court, unless properly approved vouchers therefor have been filed with the comptroller."

Both of the foregoing provisions indicate that the individual vouchers should be approved by the commission. The commission may, of course, act through a majority of its members as provided in G. L. c. 4, § 6, cl. 5. In addition, where the commission has actually voted to approve a voucher, it may authorize some other person, such as the chairman or executive secretary, to sign for it thereby indicating commission approval.

The actual power of the commission to approve vouchers is, however, a power which may not be delegated. Such conclusion has been reached in unpublished opinions of the Attorney General to the Auditor dated April 17, 1917, and August 23, 1920. There appears to be no substantial change in the law since that time which would cause this office to depart from the opinions then rendered.

Your second question is as follows:

"Once the commission has determined the number of employees and grades necessary, subject to appropriation, may the commission vote to authorize the chairman or executive secretary to sign requisitions for personnel?"

For the reasons previously stated, this question also is answered in the negative. General Laws c. 32A, § 3, provides in part that —

". . . The commission . . . may, subject to appropriation, incur expenses and appoint an executive secretary and such other employees as may be necessary to administer the provisions of this chapter . . ."

General Laws, c. 31, § 15, provides in part that —

"No person shall be appointed or promoted to any position in the classified civil service except upon requisition by the appointing officer and upon certification by the director from an eligible list prepared in accordance with this chapter and the rules made thereunder . . ."

The "appointing officer" referred to in § 15 includes any person, board or commission having the power of appointment or employment (G. L. c. 31, § 1).

From the foregoing statutes it appears that the commission has the power of appointment and must make the requisition for employees. It may act through a majority of its members and, once having voted on a particular requisition, may authorize its chairman or executive secretary to sign the requisition for the commission. The actual power to requisition may not be delegated by the appointing authority.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By JOSEPH H. ELCOCK, Jr.,
Assistant Attorney General.

State Employee — Accidental Disability Retirement — Accidental Death Benefit — Hypertension or Heart Disease.

Nov. 21, 1956.

Hon. JOHN F. KENNEDY, *Chairman, State Board of Retirement.*

DEAR SIR:— You have recently requested an interpretation of §§ 7, 9 and 94 of G. L. c. 32, which sections relate to accidental disability retirement, accidental death benefit, and the presumption that in case of heart disease the impairment of health was suffered in line of duty.

Two specific cases, each one involving a Metropolitan District Commission police officer, are now before you for action. In one case a sergeant suffered a heart attack on December 5, 1955, and he is claiming accidental disability retirement under c. 32, § 7. In the other case a patrolman died on November 24, 1955, as a result of heart disease, and his widow is claiming accidental death benefit under c. 32, § 9. You advise me that all of the requirements of §§ 7 and 9 have been satisfactorily met except for the question of compliance with the provision quoted in the next paragraph.

Both § 7 and § 9 require, in addition to other conditions for allowance of the disability retirement or death benefit, respectively, that the incapacity or death must have resulted from "a personal injury sustained or a hazard undergone as a result of, and while in the performance of, his duties at some definite place and at some definite time. . . ."

The requirement of "personal injury" is met by the heart attack or heart disease which you have found caused the incapacity or death. The requirement that the injury be suffered while in the performance of duties is met, in the absence of contrary evidence, by the presumption created by c. 32, § 94, that "any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death . . . shall . . . be presumed to have been suffered in line of duty. . . ." But because of doubt as to compliance with the remaining requirement that the injury must have occurred "at some definite place and at some definite time," you request an opinion of this department. Specifically, your first inquiry is as follows:

"Do the provisions of § 94 remove the requirement in § 7 and § 9 as to the necessity of an injury having been sustained or a hazard having been undergone at some definite time and place? In other words, must an applicant prove an injury sustained or a hazard undergone at some definite time and some definite place if such applicant is a police officer or the widow of a police officer where such police officer is permanently disabled or dies as a result of a condition of hypertension or heart disease?"

The above questions are not answered by the recent decisions of the Supreme Judicial Court, *Selectmen of West Springfield v. Hoar*, 333 Mass. 257, and *Foster v. City of Everett*, 334 Mass. 14, which discuss the application of § 94 to §§ 89A and 83A (a) of chapter 32.

Although § 94 contains no direct reference to the requirement of a definite place and time, it is my opinion that the only reasonable interpretation which can be given to § 94 is to hold that it removes the need for independent proof of a definite time and place in the cases now before you. Section 94, to the extent pertinent to the present question, provides as follows:

"Notwithstanding the provisions of any general or special law to the contrary affecting the non-contributory or contributory system, any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a uniformed member . . . of the police force of the metropolitan district commission . . . shall . . . be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence."

The words "or death" were added to the above section by St. 1956, c. 411. But death was covered by the section, even without express reference, prior to such amendment. *Selectmen of West Springfield v. Hoar*, 333 Mass. 257.

The above statute, both by its content and expressly by its title, refers to the "accidental disability retirement law" of c. 32. Section 7 of c. 32 is entitled "Accidental Disability Retirement," and is the only section in the chapter so entitled. Section 9 covers the same kinds of injuries as § 7, with almost identical wording, but relates to death rather than disability. It would be unreasonable to interpret § 94 in such a way that it could not apply to either § 7 or § 9. This would be the result if it were held that the presumption of injury in line of duty created by § 94 did not extend to and cover and meet the requirement of §§ 7 and 9 that the injury occur at some definite time and place. If in a heart disease or hypertension case there was evidence that the condition occurred at some definite time and place (which evidence would be available in heart disease and hypertension cases only occasionally), this evidence of time and place could show that the injury occurred in line of duty, and retirement allowance or death benefit would be granted on the basis of § 7 or § 9, without the need for § 94. On the other hand, if the evidence of time and place showed that the injury did not occur in line of duty, and therefore that no payment could be made under § 7 or § 9, the presumption in § 94 could not apply in the face of such contrary evidence. With such evidence of time and place, § 94 is not needed. To add to these two situations in which proof of time and place excludes the operation of § 94, an interpretation that § 94 is not effective by itself and that there must be independent proof of the exact time and place (in hypertension and heart cases such evidence of time and place could rarely be obtained), would render § 94 totally futile. This result should be avoided. "An intent to pass an ineffective statute is not to be imputed to the Legislature." *Repucci v. Exchange Realty Co.*, 321 Mass. 571, 575.

In my opinion, § 94, read as a whole, including its title, and its very broad first clause, discloses a legislative purpose to provide accidental retirement allowances and death benefits even though the nature of the injury, hypertension or heart disease makes it difficult or impossible to pinpoint the exact time and place and thereby prove that the injury was suffered in line of duty. "A legislative act ought to be interpreted, whenever permitted by its words, so as to make it effective toward a substantial end and not devoid of vitality." *Flood v. Hodges*, 231 Mass. 252, 257. It is entirely reasonable to apply the presumption in § 94 that the injury was suffered in line of duty to include a coverage of a definite time and place because the exact time and place of injury is very much a part of a finding that an injury was suffered in line of duty. "The time when a personal injury is received, within the meaning of the workmen's compensation act . . . is important in several respects. The injury must be received

by the employee 'in the course of his employment.' . . ." *Crowley's Case*, 287 Mass. 367, 370.

Application of § 94 to some of the restricted and special accidental disability provisions in c. 32 which do not contain a requirement of proof of a definite time and place (to §§ 26, 46, 66, for some examples) and failure to apply it to the general and ordinary disability sections (§§ 7 and 9) would not meet the broad and obvious legislative purpose of § 94.

For the above reasons, it is my opinion that, if the applicants in the two cases before you are entitled to the benefit of the presumption in § 94, it is not necessary for them to produce independent evidence that the heart disease was sustained at some definite time and place.

Very truly yours,

GEORGE FINGOLD, *Attorney General*.

State Employees — Barrington Plan — Accrual of Annual Increments.

DEC. 3, 1956.

Mr. WALTER R. BAYLIES, *Acting Commissioner of Administration*.

DEAR SIR:— You have requested my opinion regarding the correct interpretation of St. 1956, c. 729, which gives salary increases to State employees under the so-called Barrington Plan, and St. 1956, c. 746, § 9, which places a \$1000 maximum restriction on salary increases. Your specific problem relates to the application of the restriction on maximum increase to the customary step-in-range annual increases in pay.

The salary increases granted by c. 729, by which the Legislature adopted the Barrington Plan, became effective on October 1, 1956. The restriction on maximum increases during the final nine months of the 1957 fiscal year (October 1956 to June 1957, inclusive) is stated in c. 746, § 9, as follows:

" . . . during the fiscal year nineteen hundred and fifty-seven, the rate of compensation of each employee allocated to the new salary plan shall be limited to an increase not in excess of one thousand dollars per annum over the rate paid to such employee on September thirtieth, nineteen hundred and fifty-six . . . "

You present the following factual situation:

"A person holding the position of State Hospital Steward, a Grade 56 position with salary range of \$5,700 Min. \$7,140 Max. per annum as of September 30, 1956, with step rates of \$240 in accordance with G. L. c. 30, § 46.

"On October 1, 1956, by virtue of St. 1956, c. 729, this position was changed from a salary grade #56 to a Job Group #18 with salary range of \$6,812 Min. annually and \$8,684 Max. annually with step rates of \$312 per year.

"On September 30, 1956, this person is being paid the Minimum of the Grade or \$5,700 per annum.

"On October 1, 1956, it is proposed to allocate him in the salary schedule at the Minimum rate of \$6,812 per annum, but due to the limitation of \$1,000 in c. 746, § 9, to then set a salary for the fiscal year 1957 at \$6,700.

"This employee will have performed services in the class for twelve months on December 1, 1956, and will be entitled to a step rate increase in the amount of \$312 establishing his rate in the salary schedule at \$7,124."

You state that your proposed action in the above situation, subject to my opinion, will be as follows:

"It is proposed to establish this employee's rate in the salary schedule on December 1, 1956, at \$7,124, but due to the limitation of \$1,000 in c. 746, § 9, to set a salary for the fiscal year 1957 at \$7,012."

You request my opinion upon the following question:

"Does the Director of Personnel and Standardization comply with the provisions of c. 746, § 9, if he acts as proposed?"

I answer your inquiry in the affirmative. In my opinion, the \$1,000 restriction is applicable to the increase in rate of compensation from the old schedule on September 30 to the new schedule on October 1, and does not limit or prevent the subsequent addition of the customary step-in-range increase in salary.

The policy in this Commonwealth of giving annual increases to State employees is firmly established. This policy has been in effect on an informal basis since 1926 (upon recommendation of the Division of Personnel and Standardization, and approval of such recommendation by the Legislature in the budget), and on a formal basis since 1948 by various acts of the Legislature commencing with St. 1948, c. 311. Such a plan — for annual increases, for a stated number of years, to a certain maximum — is essential to any business which expects to attract and retain competent help. To abandon, even temporarily, such established and just recognition of faithful service by a plan of annual increments, could be harmful to the entire work of the Commonwealth. There is nothing in the provision for the \$1000 restriction on increased rate of compensation which in any way indicates that the Legislature intended to abandon or curtail or interrupt this established policy of annual increments to State employees.

A contrary intention, that is, that such annual increments are to be continued, is gathered from several parts of the 1956 legislation. The \$1,000 restriction in § 9 makes reference to an increase over the "rate of compensation" paid on September 30, 1956, to employees "allocated" to the new salary plan. In St. 1956, c. 729, which gives effect to the Barrington Plan, an "allocation" refers to the initial placing of an employee in the new salary schedule. See definitions in § 5. References to the rate of compensation on September 30, 1956, and to the rate of compensation on October 1, 1956, which is the time of the initial entry under the new schedule, exclude from both references an annual increment due at a later time. Furthermore, the last paragraph of § 5 of c. 729 provides that annual salary increments are to be given "after a person has been allocated" under the new salary schedule. Also, the title of c. 729 states that one of the purposes of the act is to reduce the time required to reach maximum rate. This purpose would be nullified if any annual increments were to be omitted.

These two new acts were intended to remedy an inadequate base pay for State employees. Chapter 729 refers to "additional" income. Chapter 746 refers to an "increase" in rate of compensation. On September 30

the employee in question not only was receiving a certain salary, but he also was entitled to a step-rate increment due on December 1. To give him the \$1,000 increase but to take away his increment would not merely be granting him "additional" income or an "increase" in rate of compensation, but would be awarding him the higher figure conditioned upon a forfeiture of part of his former entitlement. Under such a ruling the new figure, in effect, would be a new salary "in lieu of" the old payment, and not a straight "addition" to or "increase" in salary as contemplated by the clear words of the statutes.

The stated purpose of the Legislature in adopting the Barrington Plan was "to correct existing inequities in the salary pay plan of the Commonwealth." St. 1956, c. 729, title. If the customary step-in-range increases are denied only to those employees who are due for such increases between October 1 and June 30, but are granted to all other employees, inequities would not be corrected but would be created. Such an interpretation, if adopted, might even prevent an increase in salary to any employee who during that period is promoted to a higher position. No such inequitable meaning should be given to these 1956 acts of the Legislature.

I have made a careful study of all parts of c. 729 and c. 746 of the Acts of 1956. In my opinion, your proposed action with reference to the salary increase and the December 1 step-in-rate annual increment for the employee referred to in your question complies with the provisions of St. 1956, c. 746, § 9.

Very truly yours,

GEORGE FINGOLD, Attorney General.

State Employees — Barrington Plan — Interpretation of 1956 Salary Schedule.

DEC. 5, 1956.

Mr. WALTER R. BAYLIES, Acting Commissioner of Administration.

DEAR SIR: — You have requested my opinion further interpreting St. 1956, c. 729, by which the so-called Barrington Plan was approved by the Legislature and a higher salary pay plan of the Commonwealth was put into effect.

You present two questions. Both of these questions involve an interpretation of § 16 of the new 1956 act. This section reads as follows:

"If an employee is receiving a salary in a salary grade under the salary schedule in effect on September thirtieth, nineteen hundred and fifty-six, which is greater than the salary provided for in the same step-in-range in the job group of the general salary schedule in effect on October first, nineteen hundred and fifty-six, to which the position occupied by said employee has been allocated, said employee shall receive a salary under the general salary schedule in effect on October first, nineteen hundred and fifty-six, which is nearest to the rate then paid but at least equal to the salary he was entitled to on September thirtieth, nineteen hundred and fifty-six; provided, however, that if an employee is receiving a higher salary

in the salary schedule in effect on September thirtieth, nineteen hundred and fifty-six, than that provided in the job group to which his position has been allocated in the general salary schedule effective October first, nineteen hundred and fifty-six, such employee shall continue under the same title and be paid in accordance with the salary schedule in effect on September thirtieth, nineteen hundred and fifty-six, and such employee shall be eligible for any increments provided therein. If such employee vacates such position for any reason whatsoever the successor in such position shall be paid a salary in accordance with the general salary schedule then in force."

Your first question is as follows:

"We have many cases where the employee's salary set out in G. L. c. 30, § 46, as of September 30, 1956, was such that it could be allocated to a step-in-range in the Job Group to which Barrington Associates has allocated their position giving such employee an immediate increase in salary but which would provide, eventually, a lower salary at the maximum in the Job Group in question than existed in the salary schedule in effect on September 30, 1956.

"Is the Director of Personnel and Standardization correct in interpreting § 16 of St. 1956, c. 729 as requiring that such employee must be allocated to the salary schedule in effect on October 1, 1956?"

Under the first clause of the first sentence of § 16, quoted above, the employees mentioned in your first question must be placed in the new salary schedule, since there is a step-in-range figure which is greater than the salary received by them on September 30, 1956. The fact that the maximum salary available in the new job group may be lower than the maximum granted under the old salary schedule does not cause these employees to be continued under the old salary schedule.

Your second question is as follows:

"We also have some employees whose salaries under the old salary schedule in effect on September 30, 1956, were larger than any step-in-range in the new salary schedule in effect on October 1, 1956, as a result of Barrington allocation.

"Is the Director of Personnel and Standardization correct in interpreting § 16 of St. 1956, c. 729 as requiring that such employees shall be paid in accordance with the salary schedule in effect on September 30, 1956?"

Under the proviso clause of the first sentence of § 16, quoted above, the employees mentioned in your second question, whose salaries on September 30, 1956, were larger than any step-in-range within their job group in the new salary schedule, must be continued in accordance with the salary schedule in effect on September 30, 1956.

Accordingly, I answer both your questions in the affirmative.

Very truly yours,

GEORGE FINGOLD, Attorney General.

Drunkenness — Imprisonment — Release or Discharge.

DEC. 5, 1956.

Hon. RUSSELL G. OSWALD, *Commissioner of Correction.*

DEAR Sir: — You have requested an opinion of this department relative to the effect of certain sections of St. 1956, c. 715.

Said c. 715 established a program for the control of alcoholism in this Commonwealth, and, by amendments to certain sections of the General Laws, changed the existing provisions relative to the sentencing and discharge of persons committed to correctional institutions for drunkenness. As you point out, these changes in the law will shortly become effective. Your inquiries relate to their effect upon the rights of persons presently under sentence for drunkenness.

1. As it now exists, the law permits you to grant a *conditional release* to any prisoner confined only for drunkenness, and to revoke the same at any time; it further provides that such a release will become void upon its holder's violation of any of its terms or of any law of the Commonwealth. G. L. c. 127, § 136A, as amended by St. 1951, c. 33. Section 19 of c. 715, which will become effective December 27, 1956, has rewritten § 136A so as to provide that *after he has served sixty days, and upon the recommendation of the doctor in charge of the clinic at the institution, and with the approval of the principal officer* of the institution, you may unconditionally discharge such a prisoner. In answer to your first question, I advise you that on and after the effective date of the 1956 act you will have no further authority to grant *conditional releases* in such cases.

2. Secondly, you inquire whether, on and after said effective date, you may revoke a conditional release theretofore granted by you under the present provisions of § 136A. Since the date of your letter, however, I have been informed by your office that you have no intention of exercising any such power, if it exists. Accordingly, there seems to be no present need for any answer to this question, and I express no opinion concerning it.

3. Your third question concerns the effectiveness, on and after December 27, 1956, of your revocation prior to said date of such a conditional release. I advise you that such a revocation remains fully effective notwithstanding the changes in your powers resulting from the new legislation.

4. Your remaining questions relate generally to the rights of persons presently serving sentences for drunkenness to the benefits of the 1956 legislation. Under G. L. c. 272, § 48, and c. 279, § 36 (St. 1955, c. 770, § 104), as they now exist, persons sentenced for drunkenness to the reformatories, and men sentenced for drunkenness to the State farm, may be held therein for not more than one year. The new provisions in such cases place a time limitation of six months upon the holding of such persons. St. 1956, c. 715, §§ 20, 24 and 26. I advise you that the custody of all such prisoners will, on and after December 27, 1956, be governed by these new provisions, and that they will thereupon be entitled, also, to be employed on day work under the provisions of G. L. c. 127, §§ 86A *ff.*, inserted by § 18 of said c. 715.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By ARNOLD H. SALISBURY,
Assistant Attorney General.

State Employee — Employee of Bookstore at University of Massachusetts — Entitlement to Workmen's Compensation Benefits.

DEC. 11, 1956.

Mr. EDWARD P. DOYLE, *Secretary, Division of Industrial Accidents.*

DEAR SIR: — You have requested the opinion of this department regarding the status of the store at the University of Massachusetts. Your inquiry arises in connection with the application for workmen's compensation benefits under c. 152 of the General Laws by the head bookkeeper at the university store.

You request an opinion upon the following question:

"Is the operation of the university store at the University of Massachusetts which is referred to in G. L. c. 75, § 5A, as amended, an official activity or function of the Commonwealth, notwithstanding that the operation of said store is not provided for from funds appropriated by the General Court from the treasury of the Commonwealth?"

I answer your question in the affirmative. The facts with reference to the operation of the store at the University of Massachusetts are as follows:

Prior to 1918 the predecessor of the University of Massachusetts was a public charitable corporation for educational purposes. St. 1863, c. 220. Since 1918 the University of Massachusetts has been a State institution. St. 1918, c. 262. Prior to 1918 the University sold textbooks to the students through its treasurer's office. This activity, which became known as the bookstore or university store, was continued after the University became a State institution. For many years the store has been financed through one of the so-called revolving "Students' Trust Fund Accounts." The store account has shown a surplus of receipts over disbursements, and no appropriation of money from the Legislature has been made to such account. This practice was confirmed by St. 1939, c. 329, now G. L. c. 75, § 5A, by which the Legislature directed that —

"All receipts from student activities, including the operation of the university store . . . shall be retained by the trustees in a revolving fund or revolving funds and shall be expended as the trustees shall direct in furthering the activities from which the receipts were derived . . ."

The function of the store is to provide necessary books and other supplies and incidentals, including a snack-bar, to the students at prices that will be economical to the students. The trustees of the University, through the president and other administrative officers, determine the policies of the store and approve appointments of personnel. The director of the store is employed by the trustees. The funds of the store are maintained in the office of the treasurer of the University and all receipts and disbursements are handled by the treasurer of the University. Employees of the store, including the claimant in this case, are paid weekly on the same payroll as other employees of the University from the treasurer of the University. The source of their compensation is, as a matter of book-keeping, the university store account. There has always been sufficient store income to cover all store disbursements.

Since the above question has been answered in the affirmative, it does not appear that you require answers to your five other specific questions. These other questions, however, relate to the status of the claimant as an employee of the Commonwealth within the meaning of the laws relating to workmen's compensation. In my opinion, the claimant is an employee of the Commonwealth for such purposes. By the statute making the University of Massachusetts a State institution, it was provided that all University employees became State employees. St. 1918, c. 262, § 5. My answer to your first question indicates that the operation of the store is a State function. It is not a private venture of the trustees. The store is being operated under the direction of the trustees by virtue of their positions as duly appointed trustees of this State institution. There is nothing in the statute to indicate that an employee of the store is not an employee of the Commonwealth. The fact that the store is a self-sustaining unit and that no appropriations have been made by the Legislature for the support of the store or for compensation of employees who work in the store does not mean that such employees are not State employees.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

State Employees -- Barrington Plan — Payment of Bonus in Addition to Salary.

DEC. 17, 1956.

Mr. WALTER R. BAYLIES, *Acting Commissioner of Administration.*

DEAR SIR:— You have requested my opinion further interpreting St. 1956, c. 729, which adopted the so-called Barrington Plan and which provides for general increases in the salary pay plan of the Commonwealth.

You present the following question: Can the employment office managers and the principal interviewers in the Division of Employment Security, who perform supervisory duties in addition to their regular work and who have, for that reason, been paid a bonus in addition to the salary set forth in the regular salary schedule, continue to be paid such bonus under the new salary schedule adopted by the Legislature by St. 1956, c. 729?

The facts are as follows: Some employment office managers perform supervisory duties, and some do not. These supervisory duties consist of supervision by designated employment office managers of other managers in the same grade. All managers were allocated to grade 45 in the old salary schedule, but those managers who performed supervisory duties received a bonus in addition to the regular salary paid to all managers. The same situation has existed with respect to the principal interviewers: all were allocated to grade 28, but those with supervisory duties over other interviewers were paid a bonus. This practice has been in effect since 1942. Under the new salary schedule, all managers and interviewers, irrespective of the performance of supervisory duties, have been allocated to job groups 13 and 10, respectively. The managers and interviewers who in the past

have performed supervisory duties will continue to do so under the new salary pay plan. The question which you present is whether the bonus, paid in the past to cover these additional supervisory duties, can continue in the future.

In my opinion, your question must be answered in the affirmative.

Payment of such bonus in the past, to compensate for the performance of additional supervisory duties, not required of other employees in the same position, was lawful. Approval of this practice was given by the Division of Personnel and Standardization, and also by the Governor and Council. The practice has continued for fourteen years. Approval was likewise given by the Legislature by St. 1954, c. 587. See interpretation of such act in the unpublished opinion of this department given to you under date of November 17, 1954. Payment of "other forms of compensation" for personal services, authorized in addition to regular salaries, is lawful. See the 1955 general appropriations act, St. 1955, c. 706, § 7. Payment for maintenance, in addition to the amount fixed by the general salary schedule, was ruled lawful in a 1948 opinion to your commission. See Attorney General's Report, 1949, p. 51. Payment of additional compensation, above the regular salary figure, for additional services, is also illustrated by the frequent payments made for overtime work.

Since payment of a bonus for the above-described supervisory duties was lawful, there is no reason which suggests that continuation of such payment for such additional duties is unlawful under the new salary schedule. In all particulars, except for the general increase of salary levels, the new salary schedule is identical with recent salary schedules. There is nothing in the new salary schedule, nor in c. 729 of the Acts of 1956 which contains the new salary schedule, which in any way indicates that a bonus, if lawful under the earlier salary schedules, would be unlawful under the new salary schedule.

The above opinion is confirmed by a common sense view of the whole situation. It is difficult to understand how payment of the same salary to persons who supervise and also to the persons who are supervised can be justified. It seems unfair to restrict the supervisors to the same salary received by those under them. It also seems impracticable to pay the same salary both to the man who supervises and to the persons who are working under him. It does not seem that such an arrangement could be successful. This allocation of the supervisors to the job group in which all other persons under them have been placed was made by an experienced group in the Division of Personnel and Standardization. Such group knew of these additional supervisory duties, and they also knew that such supervisors for the past fourteen years had received a bonus because of these additional supervisory duties. The only reasonable explanation of this allocation of the supervisors to the same group in which the persons under them were placed is to assume that the bonus paid for the performance of these additional supervisory duties would continue. An assumption that it was planned to discontinue the payment of the bonus, and in fact pay no additional compensation for the performance of these additional duties, would be unreasonable, unfair and impracticable. There is nothing in the new salary schedule or the statute which accompanies it to justify such an assumption.

For the above reasons, it is my opinion that payment of the bonus to the managers and interviewers designated for supervisory duties should continue.

In determining within which step-in-range these supervisory positions should be placed, I call your attention to § 16 of St. 1956, c. 729. This section, in referring to the amount of the former salary paid, makes reference to the "salary in a salary grade under the salary schedule in effect on" September 30, 1956. Such specific reference to the former "salary schedule" does not include the amount of the bonus which was paid to these managers and interviewers on top of their regular salary. Accordingly, the assignment of these employees to the new salary schedule is to be based on the amount of their former regularly scheduled salary exclusive of the bonus paid to them for their additional duties.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Veterans — Payment of Bonus Claims.

DEC. 19, 1956.

Hon. JOHN F. KENNEDY, *Treasurer and Receiver General.*

DEAR SIR:— In reference to veterans' bonus claims provided for under the provisions of St. 1953, c. 440, you state that all monies realized from the sale of bonds have been expended. Pending the borrowing of additional funds through a bond issue sometime next year, you ask whether the Treasurer may make payments on approved bonus claims from other funds available in the treasury.

The answer is in the affirmative. Section 10 of c. 440 provides in part that "expenditures authorized by this act shall be obligations of the Veterans' Services Fund established by chapter six hundred and eight of the acts of nineteen hundred and forty-six." Section 2 of St. 1946, c. 608, states that moneys needed for purposes of the Veterans' Services Fund may be acquired by bond issue "in addition to the moneys otherwise available for said purposes." The quoted words of § 2 make it clear that the necessary funds may be obtained either by bond issue or by use of other available funds.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By JOSEPH H. ELCOCK, Jr.,
Assistant Attorney General.

Prisoners — Deduction from Sentence for "Good Work."

DEC. 21, 1956.

Hon. RUSSELL G. OSWALD, *Commissioner of Correction.*

DEAR SIR:— You inquire whether or not a prisoner sentenced prior to October 20, 1955, the effective date of St. 1955, c. 770, is entitled to earn a deduction of his sentence for "good work" upon that part of sen-

tence served after said date in addition to earning 12½ days per month for good conduct under said chapter.

I answer your question in the negative, upon the basis of the only judicial decision upon this question now available. *Comerford v. Massachusetts*, 233 F. 2d. 294 (U. S. C. A. 1st, 1956; *per curiam*), cert. den. 352 U. S. 899 (1956). As you know, this question will be presented for the determination of our own Supreme Judicial Court in the near future, probably during the February, 1957, sitting of the full court. *Comerford v. Oswald*, S. J. C. No. 11813. Until that court finally decides against the validity of the reasoning of the Federal Court of Appeals, it is my opinion that you should assume that it will not do so.¹

Very truly yours,

GEORGE FINGOLD, Attorney General,

By ARNOLD H. SALISBURY,
Assistant Attorney General.

State Racing Commission — Interpretation of "State Fair" and "County Fair."

DEC. 28, 1956.

State Racing Commission.

GENTLEMEN: — You have requested an opinion as to the proper interpretation of the phrases "state fair," "county fair," or "state or county fairs" in G. L. c. 128A relating to pari-mutuel betting on horse and dog races.

You state that under this act the number of days of racing which can be allocated to "fairs" changes according to the kind of fair which is involved. You request an opinion as to the definition of the various kinds of fairs which are mentioned in this chapter.

There is no statutory definition of a state fair or a county fair. Technically speaking, there is no such thing in Massachusetts as a state fair or a county fair, since neither the State nor the counties officially sponsor or support any fairs. Although there are no fairs which can be given this technical description, and although there is no definition of these terms in any of our statutes, nevertheless the descriptions were used deliberately by the Legislature and they must be given some meaning. In G. L. c. 4, § 6, cl. third, it is provided as follows:

"Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning."

Since there is no legal definition of the various kinds of fairs, the applicability of these terms must be determined as a matter of fact. This department pointed out to you in our opinion dated July 27, 1948 (Attorney General's Report, 1949, p. 21) that we do not pass upon questions of fact, and we pointed out in that opinion that you should determine as a

¹ The Supreme Judicial Court followed the reasoning of the Federal Court of Appeals. *Comerford v. Commissioner of Correction*, 335 Mass. 714.

matter of fact whether a particular fair could reasonably be said to constitute a state fair or a county fair.

In determining, as a matter of fact, whether a particular fair is a state fair or a county fair, you should apply the general rule of interpretation quoted above. Under this rule you should consider the common usage of the public in referring to specific fairs. You can also consider the practice which has actually been followed by your commission. You may also consider the classifications and designations of fairs in this Commonwealth as made by the Division of Plant Pest Control and Fairs in the Department of Agriculture.

Beyond these general rules of interpretation, we are unable to help you. As pointed out above, the matter comes down to a determination as a matter of fact by your commission.

Incidentally, I call your attention to St. 1956, c. 350, which forbids the use of the words "Massachusetts State Fair" or similar words without the consent of the Commissioner of Agriculture.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

State Employees — Retirement — Building and Boiler Inspectors in the Department of Public Safety — Statutory Interpretation.

DEC. 31, 1956.

Hon. OTIS M. WHITNEY, *Commissioner of Public Safety*.

DEAR SIR: — You have requested an opinion from this department as to the classification under the retirement laws of the building and boiler inspectors in your department. You present the following question:

"Are the Building and Boiler Inspectors in the Department of Public Safety, appointed under G. L. c. 22, § 6, classified, for purposes of retirement, in Group C, as defined in G. L. c. 32, § 3 (2) (g)?"

If this question were to be answered solely with respect to G. L. c. 32, § 3 (2) (g), the answer would be in the negative. However, the provisions of § 26 of this chapter, subparagraphs (a) and (b) of subdivision (3), if standing alone, would require an affirmative answer. These two provisions cannot be reconciled. To give effect to one provision rather than the other will change the apparent meaning of such other section. It is necessary, however, that this be done; but the matter is in great doubt, and it may be impossible to arrive at an interpretation which would be accepted by the courts.

Upon the various statutory provisions relating to this matter it is my opinion that, so far as an interpretation can be made upon the statutes, the building and boiler inspectors in the Department of Public Safety are in Group C. This is the meaning of § 26 (3) (a) and (b). These two paragraphs cannot be interpreted other than to place your inspectors in Group

C. Although § 3 (2) (g) seems to exclude such inspectors from Group C, the reference to § 26, and the reference to "inspectors of the division of state police in the department of public safety," whereas the only inspectors in the Department of Public Safety are in the Division of Inspections, lend some slight ground for accepting the interpretation that such inspectors are in Group C.

Among the divisions in the Department of Public Safety are a Division of State Police and a Division of Inspection. G. L. c. 22, § 3. The officers of the Division of State Police and the inspectors of the Division of Inspection have police powers. G. L. c. 147, § 2. The inspectors are subject to assignment "for temporary service in the division of state police." *Id.* These officers and inspectors are all appointed under c. 22, § 6. In c. 32, § 68, the words "officer" and "inspector" seem to be used interchangeably.

The administrative practice of the Board of Retirement is not helpful, because for many years it was the practice to include inspectors in Group C, but for the past few years that practice has been changed.

The classification by groups was first brought into our retirement laws in 1945. The explanation that the allocation of the employees in the Department of Public Safety was not completely and correctly delineated in the revised retirement laws adopted at that time may be the correct explanation, but this does not help in an immediate interpretation.

For the reasons set forth above, it is my opinion that the building and boiler inspectors in the Department of Public Safety, appointed under G. L. c. 22, § 6, are classified in Group C.

Although I believe that the above interpretation is required as a matter of law, it is clear that this conclusion could be contested by a judicial tribunal. Because of the very definite inconsistency between § 3 and § 26 of c. 32, it may be advisable to have this question clarified by the Legislature.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Autopsies — Absence of Consent by next of Kin — State Institutions.

DEC. 31, 1956.

Mr. JOHN L. QUIGLEY, *Commandant, Soldiers' Home, Chelsea.*

DEAR SIR:— You have requested an opinion of this department concerning your right to grant permits for autopsies.

Apart from the statutes, the right to grant a permit for an autopsy, if not covered by instructions or the will of the deceased, is a right of the next of kin. *Sheehan v. Commercial Travelers &c. Ass'n.*, 283 Mass. 543, at 553. *Gahn v. Leary*, 318 Mass. 425, 428-429. Some of the statutes relating to autopsies are found in G. L. c. 38, § 6 and in c. 113.

I understand that your inquiry relates not to statutory autopsies but rather to the performance of autopsies by consent of the next of kin. In this connection you state as follows:

"There, of course, are cases in which there is no next of kin or any one to assume final responsibility for the funeral arrangements. In such cases, our medical staff is vitally concerned with obtaining an autopsy permit. In the past, the undersigned has granted such authorization. Of late, however, there has been an increase of probably six to eight cases per year. The undersigned has always been satisfied by the medical staff as to the reason for the request and attempts to act as if it were a relative of his own family."

I do not know of any law which gives you authority to consent to an autopsy in behalf of the next of kin. I do not believe that the statutes cited above cover your situation. Your personal permit, both as a matter of fact and as a matter of law, is not a permit by the next of kin. Even if there was no next of kin, I do not know of any law which permits you to act in lieu of the next of kin and with such authority.

In accordance with your request, this is only a brief and informal opinion. If it would be of assistance to you, I would be glad to talk to you by telephone further in this matter.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Capital Outlay Appropriation — Restriction on Use of Money.

DEC. 31, 1956.

Hon. FRANCIS W. SARGENT, *Commissioner of Natural Resources.*

DEAR SIR: — You have requested the opinion of this department regarding your right to use money from the 1955 capital outlay appropriations for purposes not enumerated in the legislative act. You call attention to Item 8256-09 of St. 1955, c. 738, providing for a special capital outlay program, and you also call attention to your general authority under G. L. c. 132A, § 3, to acquire lands suitable for purposes of conservation or recreation. You then present the following question:

"In preparing plans for the development and improvement of existing recreation areas, other than those areas mentioned above, we find it desirable, and sometimes necessary to acquire additional land so that our designs might be put into execution. Occasionally we receive proposals that we purchase land widely separated from existing State Parks or Forests to preserve their natural beauty, historic interest, or for recreation.

"If land is acquired under the authority conferred by G. L. c. 132A, § 3, in locations other than those referred to in Item 8256-09, could payment be made from the funds provided in said Item?"

In my opinion, the answer to the above question is in the negative. The appropriations provided by the 1955 capital outlay act are very specifically limited to "the several purposes and subject to the conditions specified in said section two . . ." This restriction is in § 1, and § 1 also makes

reference to "a special program . . ." Accordingly, the appropriation in Item 8256-09 cannot be used for any purposes not specifically included in the description of such item. The intent of this item is clear in every respect. The uses to which the money appropriated is to be applied are specific. The funds so made available cannot be applied in payment of other lands acquired under G. L. c. 132A, § 3.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

• By LOWELL S. NICHOLSON,
Assistant Attorney General.

Board of Registration in Nursing — Examination for the licensing of Practical Nurses.

JAN. 8, 1957.

Mrs. HAZEL G. OLIVER, *Director of Registration.*

DEAR MADAM:— You have requested an opinion of this department regarding interpretation of St. 1956, c. 371, which relates to the examination of persons applying for licenses as practical nurses.

It is provided by G. L. c. 112, § 74A, as last amended by St. 1953, c. 350, that the Board of Registration in Nursing shall hold examinations for the licensing of practical nurses. Among other requirements, an applicant for such a license must be a graduate of an approved school for practical nurses. This requirement that an applicant must be a graduate of such a school was limited by St. 1956, c. 371. This new act provides that in two instances the board may examine persons who are not graduates of approved schools. Section 1 of the 1956 act permits examination of a person —

"who is a graduate of a school for attendants which was located within the commonwealth prior to August first, nineteen hundred and forty-four. . . ."

Section 2 of the 1956 act permits the board to examine a person —

"who furnishes satisfactory proof that he was a student in an approved school for nurses located within the commonwealth and was at the time of his withdrawal therefrom in good standing and that he received therein theoretical instruction and clinical experience equivalent to that required for graduation from [approved] schools for practical nurses"

The clear purpose of the 1956 statute is to permit examinations to be given to persons applying for licenses as practical nurses even though they are not graduates of an approved school for practical nurses. However, this extension of the right to take such examinations is limited to the exact situations set forth in the new law. The situation outlined in § 1 seems to be stated clearly. (The term "attendant" was changed to "practical nurse" by St. 1953, c. 350, § 5.) As to the situation outlined in § 2 it can be noted that the requirement for permission to take such an examination is that the applicant furnish "satisfactory proof" that (1)

he was a student in an approved school for nurses, (2) was in good standing at the time of his withdrawal from such school, and (3) that he had received certain instruction and experience equivalent to that required for graduation from approved schools for practical nurses. In the event that an applicant complies with either of these sections, he may be admitted to take the examination. It is a question of fact for your board to decide whether or not the situations specified in the 1956 statute actually exist. To assist you in making these determinations of fact, I am setting forth below some comments regarding four situations which you present.

1. You present the following situation: The board has received under § 1 certain applications from individuals claiming they are unable to present evidence of graduation because they have lost their diploma, etc., and the school is no longer in existence. The board has received one claiming she is a graduate of a school and has lost her diploma but the board has been unable to secure any tangible evidence that the particular hospital named ever conducted what might be properly considered a school for attendants at any time. The specific question of the board is — "Does the board in such cases have any alternative under the law but to reject these candidates since they have not furnished any satisfactory evidence that they meet requirements of the law?"

In the above situation I believe your board has no alternative but to reject these applications for permission to take the examination. If it is a fact that the applicant was a graduate as required by § 1, you would have to permit the taking of the examination. But before you can do this you must find as a fact that the applicant was such a graduate. In the absence of evidence which persuades you that as a reasonable matter the applicant was such a graduate, you must deny the request to take the examination.

2. Under § 2 of the new law you can permit certain students who had attended an approved school for nurses to take the examination for practical nurses if they comply with certain requirements. In this connection you present the following problem: The board would appreciate your opinion as to what it might properly regard as being "at the time of his withdrawal therefrom in good standing." The board has received a number of applications from former students who were "dismissed," "asked to resign," "reason for withdrawal," "disciplinary problems," etc. Many of these dismissals, particularly in the case of students who were enrolled in the school a long time ago, do not appear justified such as some who were dismissed for "social infractions," etc. But, if applicants were forced to withdraw, or were indefinitely suspended from the school of nursing, has the board the right to review the circumstances under which the student was dismissed, and if so, if the action of the school at that time appears unjustified, has the board the right to accept these individuals for examination, or is the board obliged to reject them according to law?

The requirement of "good standing" presents a question of fact for your decision. Before admitting an applicant to an examination you must have received "satisfactory proof" that the student who attended an approved school for nurses and then withdrew was "in good standing" at the time of such withdrawal. It seems to me that a student who had been forced to withdraw or had been dismissed or suspended cannot be said to have been in good standing at the time of his withdrawal. Even though the reason for dismissal or suspension was inadequate, it could not be said that such student was in good standing at the time of with-

drawal. The fact of inadequate reason for dismissal does not, in my opinion, justify your board in finding that the student was in good standing at the time he was dismissed. Under the new statute your board must decide as a question of fact whether or not an applicant was in good standing at the time he withdrew from the school for nurses, and it is not within your province to review the circumstances under which the student was dismissed or suspended. In this connection, however, I do not believe that a student could be considered to have been dismissed or suspended, and therefore not in good standing, merely because he could not pay his tuition and withdrew for that reason. There may be other factual situations which resemble nonpayment of tuition which would not cause the student to be in bad standing. These are all questions of fact for your board to determine.

3. Again, in connection with § 2, you present the following problem: With reference to the phrase "received therein theoretical instruction and clinical experience equivalent to that required for graduation from approved schools for practical nurses," is the board allowed discretion under the law such as follows: May the board use its own professional knowledge and experience of the differences in content of the course for practical nurses and the course for nurses to evaluate and to determine whether or not a former student has received, in fact, "equivalent" preparation and experience, even though some specific deficiencies might appear to exist?

This also presents a question of fact. The burden is upon the applicant to furnish satisfactory proof that the required instruction and experience had been received. The board should then use its own professional knowledge and experience to determine whether or not the student had received a reasonable "equivalent" to the instruction and experience required for graduation from approved schools for practical nurses. You have no discretion to ignore this requirement, but you must use your knowledge and experience and discretion in determining whether or not this equivalent exists as a matter of fact.

4. You present another situation regarding "satisfactory proof" as to the instruction and experience received by an applicant: Under "satisfactory proof" which in many cases has not been presented for various reasons, is the board allowed any discretion or is the burden of the proof on the individual to present to the board as required by law "satisfactory proof" that the former student has received while in the school of nursing theoretical and clinical experience equivalent to that required for graduation from an approved school for practical nurses? Example: Many applicants were enrolled in approved schools which have been discontinued and records cannot be obtained. In cases where annual reports have been filed by the school with the office of the board, it is possible, of course, for the board to have some idea of the preparation received. However, in the absence of such information what discretion does the board have in the handling of these applications?

I think your above question has been answered to some extent by my comments under the third question. As stated there, your board cannot ignore the requirement that you must be furnished with "satisfactory proof" of the required instruction and experience. You cannot find that this requirement is met if there is an absence of proof. However, any kind of proof which is satisfactory to the members of your board, and which persuades them that the required instruction and experience have as a matter of fact been received, would be sufficient.

All of the situations which you present are cases in which your board must make a finding as a matter of fact, as jurors would in the trial of a case in court, as to whether or not these specific requirements of the 1956 act have been met. There is very little law which can be applied to such determinations of fact. The professional knowledge and experience of the members of your board give them a background for determining these matters of fact. With this background and experience, and with the use of ordinary common sense and understanding, the members should determine what they believe the facts are, and then should make a decision as to permitting an applicant to take the examination upon the basis of such facts.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Contract for Highway Construction — Bidding Procedure — Bid of "Two Dollars" in Writing but "\$2.15" in Figures.

JAN. 14, 1957.

Hon. CARL A. SHERIDAN, *Commissioner of Public Works.*

DEAR SIR:— You have requested an opinion relating to bidding procedure in connection with the award of contracts for highway construction. You state that a bidder, in submitting a bid, has written out in words the unit price of two dollars as constituting the price per cubic yard for rock excavation, and you state further that the same bidder has then written in numerals \$2.15 for the same rock excavation. You state that the department desires to award the contract to the bidder, using the figure of two dollars, which would thus make him the low bidder for the project involved. You ask whether there would be any error in making such an award.

Article 10 of the Standard Specifications for Highways and Bridges, upon which bids are submitted, provides in part as follows:

"Proposals which fail to meet the requirements of Articles 5, 6 and 7 or which are incomplete, conditional or obscure, or which contain additions not called for, erasures, alterations or irregularities of any kind, or in which errors occur, or which contain abnormally high or abnormally low prices for any class or item of work, may be rejected as informal."

Under the foregoing article the department has the discretion to reject the bid in question because it contains an error. Said article 10, however, does not require that such bids be rejected but leaves the matter to the commission's discretion.

It is also noted in article 5 of Standard Specifications that the following sentence appears: "In case of a discrepancy between the prices written in words and those written in figures, the written words shall govern." In

accordance with the foregoing sentence of article 5, the commission would have authority to use the bid of two dollars as written in words rather than the bid of \$2.15 as written in figures. In the event that there is a substantial error in a bid which is apparent to the commission, then the commission may not be able to hold a bidder to such bid submitted in error. In the case presently being discussed, it does not appear that such a substantial error does in fact exist.

In conclusion, it is probably within the discretion of the commission to award the contract based upon the bid of two dollars as described above.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By JOSEPH H. ELCOCK, Jr.,
Assistant Attorney General,

Department of Corporations and Taxation — State Purchasing Agent — Books and Forms for Municipalities Ordered by Director of Accounts.

JAN. 18, 1957.

Hon. JOHN DANE, JR., *Commissioner, Department of Corporations and Taxation.*

DEAR SIR:— You have requested my opinion as to whether or not printing or supplies purchased in behalf of municipalities by the Director of Accounts in your department must be approved by the State Purchasing Agent or by the Commission on Administration and Finance.

The Director of Accounts, appointed under G. L. c. 14, § 1, is charged with the compilation of municipal statistics and the auditing of municipal accounts. G. L. c. 14, § 7; c. 44, §§ 35–46A. Part of his work is to secure uniformity in these accounts. In this connection, § 38 of c. 44 provides as follows:

“The accounting systems installed in accordance with this chapter shall be such as will, in the judgment of the director, be most effective in securing uniformity of classification in the accounts of such cities, towns and districts. The director may supply approximately at cost to cities, towns and districts where such accounting systems have been installed such books, forms or other supplies as may be required from time to time after the original installation of such systems.”

Municipalities may, but are not required to, obtain such supplies from the director. If they do request such supplies from the director they must pay the approximate cost of such material. For this purpose an appropriation is made for the initial purchases under the orders of the director — for example, see 1955 appropriation of \$45,000 “for the expenses of certain books, forms and other material which may be sold to cities and towns requiring the same for maintaining their system of accounts.” St. 1955, c. 706, § 2, Item 1203–12, page 677. Payments by municipalities for this material go to the State Treasurer, and such repayments cancel out this appropriation in full.

Your request for an opinion is as follows:

"Your opinion is respectfully requested as to whether books, forms, and supplies which the Director of Accounts is required to supply to cities, towns, and districts must be ordered through the Commission on Administration and Finance or whether the Director of Accounts may purchase the books and forms without the necessity of obtaining approval of the Purchasing Agent and the Commission on Administration and Finance."

Three statutes must be considered:

1. St. 1955, c. 706, § 10 (and similar provisions in other recent appropriation acts), provides that expenditures for any "document," whether "for outside or interdepartmental circulation," must be approved by the State Purchasing Agent.

2. G. L. c. 5, § 1, first paragraph, provides that "the state printing and all publications by the commonwealth" shall be supervised by the State Purchasing Agent. Other paragraphs in this section refer to bids and contracts by the Commission on Administration and Finance, "or any other awarding official," in connection with printing "for the several departments" of the State.

3. G. L. c. 7, § 22, provides that the commissioners of the Commission on Administration and Finance shall make regulations governing the purchase of supplies by the State Purchasing Agent "for the various state departments."

I do not believe that the above statutes apply to the material obtained by the Director of Accounts under c. 44, § 38. This material consists of sheets of ruled paper, of uniform sizes and uniform rulings for various purposes, and with subject matter printed at the head of some columns, together with the name of individual municipalities. These sheets of paper are blank, except for the rulings and columnar headings. They are ready for the placing of records and information upon them, but as ordered by the Director of Accounts they are merely blank forms. After a careful study of the above statutes, both in their present and in their earlier forms, it is my opinion that these blank forms ordered by the director for the convenience of various municipalities, and paid for by such municipalities, are not "documents" or "publications" or "state printing" or supplies "for the various state departments," and that they are not subject to the provisions of these three statutes.

There is no administrative practice which is controlling. A small portion of the printing and purchases under c. 44, § 38, has received the approval of the State Purchasing Agent; but the greater part of this printing and material has been obtained without such approval. The reference to "supervision of state printing" in c. 5, § 1, has been on our statute books in some form for about sixty years, but it has only been in recent years that even a small amount of this printing and materials for municipalities has been purchased by the State Purchasing Agent.

The opinion of this department in Attorney General's Report, 1939, p. 87, is not pertinent because that opinion can properly be applied to the considerable amount of printing, not under c. 44, § 38, which is needed by the Director of Accounts and which in fact consists of "documents" and of printing "for a state department."

Considering the problem of the printing and materials ordered to carry

out the provisions of c. 44, § 38, and the exact wordings of the three statutes cited above, and also the administrative practice, it is my opinion that the printing and purchasing under c. 44, § 38, of "books, forms and other supplies" for municipalities, to be paid for by them, is not subject to the supervision of the Commission on Administration and Finance nor does it require the approval of the State Purchasing Agent.

Very truly yours,

GEORGE FINGOLD, Attorney General.

State Employees — Retirement for Accidental Disability — Necessity for Examination by a Medical Panel.

FEB. 12, 1957.

State Board of Retirement.

GENTLEMEN: — You have requested an opinion regarding the necessity of a physical examination under G. L. c. 32, § 7.

You present the following request for opinion:

"Your opinion is respectfully requested on the question as to whether or not the State Board of Retirement is required by the provisions of G. L. c. 32, § 7, to cause a physical examination to be made of an applicant for accidental disability retirement under said section, or whether the board may disapprove such application if the facts as appearing in the case are sufficient to justify this action."

It is clearly provided in c. 32, §§ 6, 7, that no member of the State Retirement System can be retired for accidental disability under § 7 unless there has been an examination by the medical panel provided for in § 6 (3). Without such an examination the Retirement Board is without authority to make a finding that the required incapacity exists. *Hunt v. Contributory Retirement Appeal Board*, 332 Mass. 625, 627. The statutes require such an examination, even though the report of the medical panel is not binding on the board. *Cassier v. Contributory Retirement Appeal Board*, 332 Mass. 237, 240.

In my opinion, the requirement of a medical examination goes even further. Although the literal words of the statute provide only that no retirement for accidental disability shall be allowed by the board unless there are an examination and a favorable report by a medical panel, I believe the correct interpretation requires that there should be a medical examination if any question of mental or physical incapacity, or any related question, is to be considered by the board. That is, although the board may be determined that the application will be denied because, in its opinion, there is no required mental or physical incapacity, I believe the intent and benefit of the statute would be violated if a final decision to this effect were made by the board without having an examination by a medical panel or without giving due consideration to such report.

On the other hand, however, there may be some circumstances under which an application for accidental disability retirement under § 7 may be denied even without there being a physical examination by a medical panel. Several required conditions for the allowance of accidental disability retirement are specified in § 7. Some of these have no possible relation to

the mental or physical incapacity covered by the section; and some of these specified conditions are requirements precedent to the existence of jurisdiction to allow retirement under this section. Some of these required conditions are as follows: The section does not apply to a member in service classified in Group C to whom the provisions of § 26 (2) are applicable; the benefits of this section do not pertain to a person who sustains the incapacitating accident after he has passed the maximum age for his group; nor is such section applicable if the accident in question took place before the date the employee became a member and before the date when the employee was protected by any provision relating to non-contributory pensions; another requirement is that there be a "written application on a prescribed form filed with the board"; nor does this section cover a case in which the injury was sustained more than two years prior to the filing of the application and no notice of the injury was filed with the board within ninety days after its occurrence; and, finally, the section does not provide for accidental disability retirement if the application is filed with a retirement board other than the board of the unit where the applicant is presently employed.

In my opinion, a request for allowance of accidental disability retirement under § 7 may be denied upon a finding that one or more of the essential jurisdictional requirements of § 7 do not exist. If such facts do not exist, there can, of course, be no allowance of the disability retirement. Under such circumstances it would be unreasonable to require a medical examination which, no matter what the findings might be, could not possibly entitle the applicant to retirement under this section. I do not believe the references in §§ 6 and 7 require any such unreasonable result.

But even as to the jurisdictional facts referred to in the second paragraph above, the applicant is entitled to present his proof and be heard in connection with the existence of such required jurisdictional facts. And if any of these questions should relate in any way, directly or indirectly, to the question of incapacity or the proximate connection between the accident and the disability, in such cases I believe that a medical examination should be required.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Department of Corporations and Taxation — Demotion of Officer without Hearing — Lapse of Three Years without Action by Officer — Moral Obligation.

FEB. 14, 1957.

Hon. JOHN DANE, Jr., *Commissioner, Department of Corporations and Taxation.*

DEAR SIR: — You have requested my opinion as to the rights of Francis X. Lang, formerly an employee in your department.

You present the following facts: On May 8, 1946, Lang was duly appointed to the office of Director of the Division of Accounts, in the Depart-

ment of Corporations and Taxation, with the advice and consent of the Governor and Council. On March 5, 1953, after six years and ten months of service as Director of the Division of Accounts, Lang was removed from this position. This removal was by Commissioner Henry F. Long, then the Commissioner of the Department of Corporations and Taxation, and was made with the advice and consent of the Governor and Council. On March 5, 1953, the date of Lang's removal, he was appointed as Supervising Assistant Director of the Division of Accounts. This appointment was made by Commissioner Long, with the advice and consent of the Governor and Council. Although objecting to this demotion, Lang entered upon his new appointment and continued service in that position until recently.

You advise me that Lang has continued to object to his demotion, has claimed that it was invalid, and he has now made demand upon you for reinstatement and for payment of the difference between the salary under his former position and that received by him after his demotion. In this connection you request my opinion as to the rights of this former employee.

Lang's appointment to the position of Director of the Division of Accounts and his service therein from 1946 to 1953 were under the provisions of G. L. c. 14, § 4, prior to the amendment of that chapter and the reorganization of your department under St. 1953, c. 654. In 1951 the Legislature, by an act "regulating the separation from service of the Commonwealth of certain employees of the Department of Corporations and Taxation" (St. 1951, c. 470), provided that persons holding a position such as the position of Director of the Division of Accounts "shall not be involuntarily separated therefrom except subject to and in accordance with the provisions of" G. L. c. 31, §§ 43-45. These sections require notice to a protected employee before he is removed or lowered in rank or compensation, together with a written statement of reasons for such removal or demotion, and also an opportunity for hearing. Lang was removed or demoted without compliance with these provisions. If he had held his position for less than five years, removal by a commissioner with the advice and consent of the Governor and Council, as then provided in G. L. c. 14, § 4, would have been valid. However, since Lang had held such position for a total period of more than five years, he could not be separated therefrom except by compliance with the provisions of G. L. c. 31, §§ 43 and 45.

It is my opinion, therefore, that since Lang was removed without compliance with the protection given to him by the Legislature his removal and demotion were unlawful.

Your inquiry to me, of course, is an inquiry as to Lang's present rights. His unlawful removal gave him no rights under c. 31 §§ 43, 45, since he was not removed under any of the provisions of those sections. He did have a right to remedy by mandamus, but since he now desires only recompense for loss of pay, and not reinstatement, that remedy is not applicable. He also had a right, because of his unlawful demotion, to bring a petition against the Commonwealth under G. L. c. 258. But such right existed only for three years (G. L. c. 260, § 3A), and therefore it came to an end on March 5, 1956. It is therefore my opinion that, at the present time, Lang has no legal rights which can be enforced against the Commonwealth.

From the facts that you have presented it appears to me that Lang has a moral claim against the Commonwealth. This seems obvious because he was demoted without compliance with the laws which were specifically applicable to his position. This conclusion is confirmed by the proceedings for mandamus against the former commissioner by a fellow employee who

was removed on the same date that Lang was demoted, and who was reinstated to his position and given his full back pay by final judgment entered in the mandamus proceedings with the consent of this department. See Middlesex Superior Court No. 186574.

The fact, however, that the Commonwealth may have a moral obligation to Lang does not give it the right to make payment to him. The defence or bar presented by lapse of time cannot be waived by a State officer. VI Op. Atty. Gen. 231, 232. *Munro v. United States*, 303 U. S. 36, 41. *United States v. Trollinger*, 81 F2d 167, 168. See also *George A. Fuller Co. v. Commonwealth*, 303 Mass. 216, at 221.

However, although Lang cannot sue the Commonwealth, and although you as Commissioner of the Department of Corporations and Taxation of the Commonwealth have no present authority to pay such moral claim, the General Court itself has power by legislative act to authorize such payment if it is of the opinion that the claim constitutes a moral claim against the Commonwealth which should now be paid from public funds. This method of presenting claims against the Commonwealth by petition to the Legislature has always existed. It was the only method available prior to the granting of permission to sue the Commonwealth first given in 1879. *McArthur Brothers Co. v. Commonwealth*, 197 Mass. 137, 138. This method is still open to Lang. Upon such a petition, the Legislature, as "the keeper of the conscience of the Commonwealth" (see VI Op. Atty. Gen. 235), can determine whether or not it should authorize payment of public money for this purpose.¹

The reorganization of the Department of Corporations and Taxation in 1953, by St. 1953, c. 654, approved July 2, 1953, effective October 1, 1953, does not alter any of the opinions expressed above. Prior to such act Lang had been demoted without authority of law, and his rights to reinstatement and to back pay existed at the time the reorganization act was approved. Although Lang's former position was abolished by the reorganization act, § 104 of that act continued the protection to all employees who were on tenure in a permanent position, and as to each of these employees it was provided that they would be appointed "to a position in the department in the same salary grade."

Very truly yours,

GEORGE FINGOLD, Attorney General.

Department of Public Works — Erection of Traffic Control Signal on Public Highway at Junction with a Private Way.

FEB. 14, 1957.

Hon. CARL A. SHERIDAN, Commissioner of Public Works.

DEAR SIR:— You have requested my opinion in connection with the installation of traffic control signals at the junctions of State highways and private ways.

¹ The General Court subsequently authorized payment of this claim. St. 1957, c. 547.

You present the following situation:

"This department is receiving increasing requests for the installation of traffic control signals at the junctions of State highways and private service roads or drives to industrial and business establishments such as factories, shopping centers, outdoor theatres and other similar locations. Also, similar requests are frequently received for approval of such installations on roads and ways under the jurisdiction of the respective cities and towns, as required under G. L. c. 85, § 2.

"The policy of this department in refusing to install or approve such signals, on the basis that such private drives are not 'ways' as defined in c. 90 and therefore cannot be signalized, is being challenged frequently by counsel representing the respective enterprises.

"The statute, G. L. c. 85, § 2, authorizes the installation of signals on State highways and certain other ways by this department. It also requires the approval by this department of signals installed by cities and towns on ways within its control. The result has been, therefore, that in addition to refusing to install signals at the junction of State highways and private drives, the department has also refused to approve the installation of such signals on city and town ways.

"Financially, these requests usually take either of the following forms:

"1. The department or city or town to install and pay for the installation.

"2. The local enterprise offers to pay the cost of installation and sometimes maintenance with ownership being transferred, if necessary, to the authority having jurisdiction over the particular highway.

"Another situation also confronted by the department and somewhat comparable to the foregoing is the case where a private drive from an establishment or even a private residence enters the highway within the area of a legal intersection of ways and it is the desire of the department to signalize the intersection."

Your powers and duties with respect to the installation of traffic control signals are set forth in G. L. c. 85, § 2. This section provides that the Department of Public Works —

"shall erect and maintain on state highways and on ways leading thereto, and on all main highways between cities and towns, such direction signs, warning signs or lights, curb, street or other traffic markings, mechanical traffic signal systems, traffic devices, or parking meters as it may deem necessary for promoting the public safety and convenience . . . No such signs, lights, signal systems, traffic devices, parking meters or markings shall be erected or maintained on any state highway by any authority other than the department except with its written approval. . . ."

The reference to "ways" in the above statute is controlled by the definition of this word in G. L. c. 90, § 1. This definition is as follows:

"'Way', any public highway, private way laid out under authority of statute, way dedicated to public use, or way under the control of park commissioners or body having like powers."

You inquire as to the power of your department under the above statutes, and you present eight specific questions as set forth below. In

connection with each question I indicate my answer. Where an additional explanation is necessary I am adding it at the end of your list of questions.

1. "Can a signal be installed at the junction of a public highway and a private driveway?" Answer: Yes.

2. "Can a signal be installed at the junction of a public highway and a private driveway using public funds?" Answer: Yes.

3. "Can a signal be installed at the junction of a public highway and a private driveway if the installation is paid for by the owner of the driveway?" Answer: No.

4. "Can the authority having the jurisdiction over the public highway accept the ownership of the completed installation as a gift?" Answer: See note below.

5. "Can public funds be spent for the maintenance of such a signal?" Answer: Yes.

6. "Can any component part of such a signal be located on private property with permission of the owner?" Answer: No.

7. "In the case of a manually operated signal in which no part of the installation is on private property, can the signal be considered legal on the assumption that control takes place the instant traffic crosses the highway side line even though following cars may be stopped on private property?" Answer: Yes.

8. "In the case of a private drive entering the highway within the area of a legal intersection, can the drive be legally signalized?" Answer: Yes.

Your power under G. L. c. 85, § 2, is to erect and maintain, "on state highways and on ways leading thereto, and on all main highways between cities and towns," such traffic control systems and other traffic markings as your department "may deem necessary for promoting the public safety and convenience." Under this statute you may install a signal "on" a public highway if "the public safety and convenience" is promoted thereby. The fact that such signal is installed at the junction of a public highway and a private way is immaterial. Since you have a power to install such signal, you can use public funds therefor. However, in my opinion, such an installation on a public highway cannot be paid for by a private owner. Because of this, I think question No. 4 above must be answered in the negative; I do not know how a private person could have the right to install a traffic signal on a public highway, even though he were thereafter to make a gift of such installation to the State. Since you have a right to install and pay for such signal, you also have a right to spend public funds for its maintenance. I have answered in the negative your question 6, as to your right to place some part of the signal on private property, because the statute does not give you such right. The statute gives you power only to erect signals on public highways or on "ways," that is, ways as are defined in G. L. c. 90, § 1. Since the statutes do not give your department any right to install a traffic signal on the private way, it is not within the jurisdiction of your department to locate such a signal or any part thereof upon such private property.

I do not agree with your assumption that the installation of such a traffic control system, at the junction of a State highway and a private way, is considered to be "for the sole benefit of the owner of the private drive." If this were a fact, you would have no right to install it because the statute gives you only the right to install such signals as you may deem "necessary for promoting the public safety and convenience." It

seems clear to me, however, that the installation of a signal on a public highway at its junction with a private drive, if necessary at all, is for the protection of the public safety and convenience of persons lawfully on a public highway. It is upon this foundation that I have answered your questions as shown above. The fact that such a signal will in effect control traffic on private property before such traffic crosses the highway sideline and enters upon the public highway does not render such signal improper. The objective of such signal is a promotion of public safety and convenience on the public way, and such signal is therefore lawful.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

*Interstate Compact for Supervision of Out-of-State Probationers and Parolees
—Meaning of Word "State."*

FEB. 19, 1957.

Mr. FREDERICK J. BRADLEE, *Chairman, Parole Board.*

DEAR SIR:— You have requested my opinion regarding the interpretation of the word "state" as used in G. L. c. 127, §§ 151A to 151G, by which provisions the Legislature in 1937 authorized a compact between this state and other states for the supervision of out-of-state probationers and parolees.

Your particular inquiry is whether or not the word "state," as appearing in the above statute, may be construed as meaning and including Alaska, Hawaii, Puerto Rico, the Virgin Islands and the District of Columbia.

I answer your question in the negative.

Ordinarily, the word "state" as used in our statutes "shall extend to and include the District of Columbia and the several territories." G. L. c. 4, § 7, cl. 31st. However, for the reasons indicated below, this statute defining the word "state" cannot be applied to the provisions of c. 127 which relate to the interstate supervision of probationers and parolees.

The provisions of §§ 151B to 151G of c. 127 relate to and supplement the compact authorized by § 151A of that chapter. A compact such as this one, entered into between several states of the United States, can be made only with the consent of Congress. "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . ." U. S. Const., Art. I, § 10, cl. 3. The consent of Congress, necessary to the making of the interstate compact under § 151A, was given in 1934 by Public Laws No. 293, 73rd Congress, Second Session; formerly contained in 18 U. S. C. § 420. Massachusetts acted upon this consent in 1937 by adopting the provisions now contained in G. L. c. 127, §§ 151A-151G. St. 1937, c. 307. However, this 1934 consent of Congress gave consent only for a compact between the states, and not for a compact between the states and a territory and the District of Columbia. Since there is no Federal definition of the word "state" applicable to all Federal statutes, this word has had varying interpretations according to the context of particular Federal statutes. In general, however, it has been held

that, unless the context requires a different interpretation, the word "state" does not include the territories and the District of Columbia. See *Words and Phrases*, Vol. 40, pages 11 and following. This restricted meaning of the 1934 Consent Act, although accepted by the persons interested in the subject matter, precipitated a movement to get Congress to broaden this Consent Act in order that the territories and the District of Columbia might become members of this compact. On August 3, 1956, the original 1934 Consent Act was broadened as desired. Public Law 1970, 84th Congress Second Session, now contained in U. S. C. Title 4, § 111. This change was made by adding a new paragraph to the 1934 Consent Act stating that the term "States" includes the territories and the District of Columbia.

Since the consent by Congress in 1934 gave consent to a compact between the states but not between a state and the territories, the compact entered into by the states pursuant to this consent is itself limited to the states themselves, and does not include the territories or the District of Columbia. A broader interpretation would have been unconstitutional. That compact, to which our Legislature gave its consent in 1937, cannot be broadened in its application to Massachusetts except with the consent of our Legislature. Such a compact is a contract, and its validity depends upon the consent both of Congress and of the states. Since the original compact did not include the territories or the District of Columbia, it is essential that a new consent be given by Congress and by the participating states to such broadening of the compact. Such consent has already been given by Congress by the law passed in 1956. To effectuate the desired broadening of this act it is now essential that the states involved, acting by their legislatures, give their several consents to such broadening, and that thereafter a new compact or an amendment to the original compact be made.

For the reasons above stated I advise you that the word "state," as appearing in G. L. c. 127, § 151A, does not include Alaska, Hawaii, Puerto Rico, the Virgin Islands and the District of Columbia.

Very truly yours,

GEORGE FINGOLD, Attorney General.

Mentally Retarded Children — Education in Public Schools — Exclusion because of Age.

FEB. 20, 1957.

Hon. JOHN J. DESMOND, Jr., Commissioner of Education.

DEAR SIR:— You have requested the opinion of this department relative to the education of mentally retarded children in the public schools of the Commonwealth. Your questions present problems relating to the age of school children, the rights of local school committees, and the effect of statutes dealing specifically with mentally retarded children.

Except in special cases, a child must attend school between the ages of seven years and sixteen years. G. L. c. 76, § 1. Cities and towns, on their part, are required to maintain public schools, and a child has a right to attend these schools, even children over sixteen years of age. G. L.

c. 71, §§ 1, 4, 6; c. 76, § 5. In most matters the local school committee has final say as to details of education, subject of course to the requirements of the statutes. This authority in local school committees includes the right to exclude a student if his attendance might cause difficulty with other children. The power of local school committees to make reasonable regulations and to make final decisions upon the facts has been established in many cases decided by our courts.

With regard to mentally retarded children, however, the situation is somewhat different. It is stated in G. L. c. 71, § 46, as most recently amended by St. 1956, c. 535, § 4, as follows:

"At the beginning of each school year the [school] committee of every town or district committee of every regional school district where there are five or more such children as determined in accordance with the first sentence of this section,"—i.e., children retarded in mental development—"shall, and every town or regional school district where there are less than five such children may, establish special classes for the instruction of the educable mentally retarded children and for the instruction of the trainable mentally retarded children according to their mental attainments, under regulations prescribed by the departments."

The above section specifies that regulations regarding special classes for mentally retarded children, instead of being prescribed by the local school committee, are to be prescribed by the Department of Education. Pursuant to this requirement regulations have been promulgated. Portions of these regulations, pertinent to the questions you ask, are as follows:

"2. . . . No mentally retarded child shall be excluded from or denied the right to attend special classes merely because of age."

"5. . . . Only those 'EDUCABLE' and 'TRAINABLE' children whose presence is not detrimental to the members of their class or school shall be enrolled in a special class."

You request an opinion on four questions. These questions, and my answers thereto, are as follows:

1. Can a local school committee exclude a mentally retarded child from school merely because of age? No, unless the reasons for exclusion because of age are applicable to all children alike.

2. If the school age in a town is $5\frac{1}{2}$ years, has a mentally retarded child the same right to enter school at that age as any other child? Yes, unless there are conditions relating to the child apart from age and mental condition which would prevent the entry and which exclusion would be applied equally to all children under the same conditions.

3. May a school committee exclude mentally retarded children at the age of sixteen if other children are allowed to remain in school for a longer period of time? No, except upon grounds which would apply to all children of such age and which would warrant exclusion for reasons not connected with age or mental condition.

I think the statute itself, and the two regulations adopted by your department and quoted above, cover the problems presented in your three questions. Your regulation that "No mentally retarded child shall be excluded from or denied the right to attend special classes merely because of age" is clear and valid. Your regulation that these children can be excluded if their presence is "detrimental to the members of their class

or school" is a valid regulation under the statute and states the only ground for exclusion. Of course, the determination of the fact that the presence of such a child is or is not detrimental is for the local school committee.

You present a fourth question, as follows:

4. What is the legal meaning of the word "child"? I am unable to give you an opinion on this question. There is no statutory definition of the word "child." If there is some specific statute which uses this word, and if you need to know the application of such word to a specific set of facts, I can give you an opinion if you will detail such circumstances. However, your general inquiry, without reference to a statute or to particular facts, cannot be answered.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Veterans — Non-Contributory Retirement — Creditable Service for Employee Holding Position as a Town Moderator.

FEB. 28, 1957.

His Excellency FOSTER FURCOLO, *Governor of the Commonwealth.*

SIR: — I am in receipt of your letter stating that Leo M. Harlow, first Deputy Secretary of the Commonwealth, is retiring for superannuation at the present time, and that he has applied for retirement under the provisions of G. L. c. 32, § 58. You inquire whether or not the period during which Harlow held the position of town moderator of the town of Easton can be considered as creditable service toward the thirty years required by § 58.

The correct interpretation of § 58, in my opinion, permits creditable service to be given to Harlow, on account of his twenty-three years' tenure as town moderator, only for the time or days he actually performed service as town moderator, and credit cannot be given to him for the entire period during which he held that position.

Although the word "service" in § 58 is not controlled by definitions of that word in §§ 1 to 28 or in other sections of c. 32, yet the true meaning of "service" in § 58, and the intent of the Legislature in using that word in § 58, are to be learned, at least in part, by an understanding of the sense in which that same word has been used by the Legislature in other portions of c. 32. My interpretation set forth in the paragraph above is consistent with, and I believe is logically required by, the various usages of that word in other portions of this chapter. See, for example, §§ 1, 3 (2) (d), 4 (1) (a), 4 (2) (b). Prior opinions by this department in which full-time credit has been given to State employees (Attorney General's Report, 1955, p. 78; Attorney General's Report, 1953, p. 29) were based upon analogies to other sections in c. 32 in which such full-time credit was indicated.

On the other hand, it is clear that service in the position of town moderator, that is, actual work done, is the kind of service for which "creditable

service" must be given under § 58. The amount of credit which can reasonably be given for this actual work depends upon the facts in the case, that is, the amount of time or the number of days when work as town moderator was performed. These facts can be obtained from the applicant or from the Commission on Administration and Finance. Of course, additional credit cannot be given for such actual work if such work was performed within a period for which creditable service has already been given to the applicant on the basis of some other service for the Commonwealth or a governmental unit.

Very truly yours,

GEORGE FINGOLD, Attorney General.

*Board of Registration of Certified Public Accountants — Examination —
Inspection of Papers by a Candidate.*

MARCH 4, 1957.

Mrs. HAZEL G. OLIVER, Director of Registration.

DEAR MADAM:— You have requested, in behalf of the Board of Registration of Certified Public Accountants, an opinion of this department as to whether or not the board is required to furnish, upon request of the candidate, a photostatic copy of an examination paper written by such candidate for registration.

I advise you that the answer to your question is in the affirmative, but with some qualifications. The rule adopted by the Governor and Council on February 18, 1948,¹ which you have furnished to me, clearly states that a candidate such as the one involved in your inquiry "may inspect his or her papers after the results of the examination have been made known." This rule clearly is applicable to examinations conducted by the Board of Registration of Certified Public Accountants. The right of a candidate to "inspect" the examination carries with it the right to make a copy of his answers. "The right to inspect commonly carries with it the right to make copies without which the right to inspect would be practically valueless." *Direct-Mail Service v. Registrar Motor Vehicles*, 296 Mass. 353, 356.

However, this right to inspect and to make copies can be exercised only in a manner which is reasonable and does not interfere with the duties of the board. For example, the time and place and circumstances of the inspection can be determined by the board, and the cost to the board, if any, can be charged to the applicant. Whatever may be "reasonable" on your part to enable the applicant to make use of his right to inspect would be required; but nothing which might be considered unreasonable could be required.

Very truly yours,

GEORGE FINGOLD, Attorney General,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

¹ RULE: Administrative Bulletin No. 90, Commission on Administration and Finance, dated March 29, 1948, re rule of Governor and Council on Feb. 18, 1948.

*Contract for Public Building — Bidding Procedure — Increase in Contract
— Emergency.*

MARCH 7, 1957.

Hon. CHARLES W. GREENOUGH, *Commissioner, Metropolitan District Commission.*

DEAR SIR: — You have asked our advice concerning Metropolitan District Commission contract No. 948 between the Commonwealth and C. Ray Norris & Son, dated July 19, 1956, and calling for repairs to the Charles River Dam. The contract is a unit price contract awarded on a bid of \$10,200, said bid being based on estimated quantities. The commission estimated that approximately 40 studs in the dam would be removed and replaced and that one rail break would require splicing. On these items the bid of the Norris company was based on a cost of \$225 per stud (\$9000) and a cost of \$800 per rail break (\$800). During progress of the work it has become apparent that approximately 58 additional studs and four additional splices must be made. At the unit prices in the contract the cost of these additional items would come to \$16,250. It appears also that an extra work order for patching a hole and for splice plates in the amount of \$4320 is contemplated. The combination of these two figures in the amount of \$20,570 would constitute an increase in the contract from \$10,200 to \$30,770. (The actual figure estimated in your correspondence is \$30,820.)

You state that an emergency exists calling for immediate completion of the work described.

You state that the Commission on Administration and Finance has asked that the method of procedure be clarified by consultation with this office before such work is authorized.

It appears that an increase in the contract price from \$10,200 to approximately \$30,800 constitutes a substantial change in the original contract which may be made only after compliance with the terms of the bid statute (G. L. c. 29, § 8A). See *Morse v. Boston*, 253 Mass. 247, 254.

Whether a change in a contract is technically an extra work order requiring approval under G. L. c. 29, § 20A, or whether it may be described as a mere change in quantities of work or material covered by unit prices in the contract, such changes may be made without compliance with G. L. c. 29, § 8A, only if the changes are incidental to the original contract. Where, as here, there is a substantial change amounting to a new contract, the bid statute must be observed.

It is noted that such bid statute (G. L. c. 29, § 8A) provides for notice and publication of proposals relating to the type of work here involved, all as directed by the Commission on Administration and Finance. It also contains the following exception:

“ . . . provided, that such publication may be omitted, in cases of special emergencies involving the health and safety of the people and their property, upon the written approval of said commission.”

You state that an emergency does exist and that application has been made to the commission for approval of waiver of publication. If such approval is granted, the necessity for publication will be removed. By an opinion of a former Attorney General directed to the Commissioner of

Public Works and dated February 19, 1951 (Attorney General's Report, 1951, p. 38), it has been determined that a waiver of publication in emergency situations includes a waiver of the posting of notice as well as a waiver of the newspaper publication.

Provided there has been a waiver of publication by the Commission on Administration and Finance, it would then be proper to award a contract to the Norris company for the additional work. In the absence of such waiver the contract may be awarded only after posting of notice and newspaper publication as required by G. L. c. 29, § 8A.

Very truly yours,

GEORGE FINGOLD, Attorney General,

By JOSEPH H. ELCOCK, Jr.,

Assistant Attorney General.

State Employee — Retirement of State Police Officer — Effect of Report by Police Rating Board.

MARCH 7, 1957.

Hon. JOHN F. KENNEDY, Chairman, Board of Retirement.

DEAR SIR: — You request an opinion of this department relative to an application for retirement for reasons of accidental disability filed with the State Board of Retirement by a State Police patrolman in the Department of Public Safety.

You inform me that this application for accidental disability retirement has been made under the provisions of G. L. c. 32, § 26 (2) (a). This provision applies to "any member in service classified in Group C who is an officer of the division of state police in the department of public safety." If such an officer applies for disability retirement under this provision he is to be examined by a registered physician appointed by the "rating board" established by subdivision (1) of this § 26, and the Rating Board shall then report in writing to the State Board of Retirement with respect to the officer's incapacity. The statute provides that the report of the Rating Board shall indicate, if it is a fact, as follows:

" . . . that such officer is physically or mentally incapacitated for the performance of duty by reason of (i), illness incurred through no fault of his own in the actual performance of duty, or (ii), an injury resulting from an accident occurring during the performance and within the scope of his duty and without contributory negligence on his part, and that such incapacity is likely to be permanent."

This provision of law also provides that, if the Rating Board shall make a report as above stated, the officer "shall be retired by the state board of retirement."

You advise me that this officer has met all requirements for disability retirement under this provision, with the possible exception as to his incapacity. On this question the Rating Board has reported to you that it has caused an examination to be made of the physical condition of the offi-

cer and as a result of such examination the Rating Board has found that the officer

"should be retired as he is physically incapacitated for the performance of duty by reason of illness incurred through no fault of his own in the actual performance of duty and that such incapacity is likely to be permanent."

Upon the above facts you request an opinion as follows:

"Your opinion is respectfully requested as to whether or not the statute requires that the State Board of Retirement must approve the application filed by this State Police patrolman solely on the basis of the examination as ordered by the State Police Retirement Rating Board and the recommendation of such board that the applicant be retired or is it necessary that the applicant prove to the satisfaction of the State Board of Retirement that he is physically incapacitated for further duty as the result of an injury sustained or a hazard undergone at some particular time and place during the performance of his duty and that such incapacity is likely to be permanent."

The report of the Rating Board adequately meets the requirements of § 26 (2) (a), and such report conclusively establishes the required incapacity. Your board has no duty or power to review this finding of fact made by the Rating Board on the question of incapacity. The requirement of physical incapacity "as the result of an injury sustained or a hazard undergone at some particular time and place" is a requirement of some other statute and is not required for retirement under § 26 (2) (a). In my opinion, you have no further duty to ascertain the facts as to the incapacity of the officer here in question other than to accept and make use of the report submitted to you by the Rating Board.

Since in this case you have found that all jurisdictional requirements other than that relating to incapacity have been met, and since the report of the Rating Board covers in full the requirements relative to incapacity, your present duty under the statute is to carry out the specific provision that the officer "shall be retired by the state board of retirement."

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Civil Defense — Right of Cities and Towns to Appropriate Money for Expenses — Uniforms.

MARCH 20, 1957.

MR. GEORGE H. BURROWS, *Acting Director, Civil Defense Agency.*

DEAR SIR: — You have requested an opinion of this department regarding equipment or uniforms to be furnished to auxiliary police under the statutes relating to civil defense.

The civil defense statute is contained in St. 1950, c. 639. It is provided by § 15 of that chapter that each city and town shall have power to make

appropriations "for the payment of expenses of its local organization for civil defense." Your question relates specifically to auxiliary police. In § 11 (a) of this chapter it is provided that cities and towns "may appoint, train and equip volunteer, unpaid . . . auxiliary police."

You request an opinion upon the following particular matter:

"I respectfully wish to be advised whether under this provision of law, cities and towns may properly appropriate and spend funds to buy uniforms for auxiliary police appointed under the authority thereof."

Although there is no express provision in the civil defense act or in any other statute authorizing cities and towns to spend funds to buy uniforms for auxiliary police, it cannot be ruled as a matter of law that such authority does not exist by virtue of the provisions of the civil defense act itself. That is, the authority in § 15 to appropriate money for the payment of expenses of its local organization for civil defense, and the authority in § 11 to equip auxiliary police, authorize a city or town to provide its auxiliary police with the use of such uniforms as are needful to such members in carrying out their duties under the civil defense act. It is clear that some duties of auxiliary police could make it needful that uniforms be supplied in the performance of such duties. One example, at the end of § 11 (c), is the duty which may be given to auxiliary police in towns to exercise the powers conferred upon regular police by § 10, which powers in § 10 specifically require uniforms. It may be possible that there are other services, for which auxiliary police may be called upon, which would either require or would need something in the nature of a uniform. If so, §§ 11 and 15 of the act authorize the towns to provide such uniforms. The decision whether or not uniforms are needed for certain duties required of auxiliary policemen is a decision which must be made, as a matter of fact, by some administrative officer charged with the responsibility of training and equipping these auxiliary policemen. Such decision cannot be made by this office.

In summary, I answer your question in the affirmative, but with the qualification that the authority to buy uniforms exists only in situations in which such uniforms are found to be needful in the carrying out of the duties given to auxiliary policemen by the civil defense act.

Very truly yours,

GEORGE FINGOLD, Attorney General,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Escape of Mentally Ill Person from State Institution — Punishment.

MARCH 22, 1957.

Hon. RUSSELL G. OSWALD, Commissioner of Correction.

DEAR SIR:— In your recent letter to the Attorney General you state the following facts relative to the commitment of one Modestino Tango to the State Farm:

On September 19, 1956, having been found guilty of a violation of G. L. c. 123, § 112, by the East Boston District Court, Tango was sentenced to the State Farm; this sentence was thereupon suspended, and Tango was placed on probation.

On January 30, 1957, the court revoked the suspension of the sentence imposed on September 19, 1956, and Tango was committed on that day to the farm.

Calling the attention of the Attorney General to the fact that the actual commitment of this person took place after the effective date of c. 715 of the Acts of 1956, you inquire:

(1) Was said commitment proper?

(2) If so, how long may Tango be held at the State Farm in custody?

Prior to the effective date of c. 715, persons properly sentenced to the State Farm for any offence other than drunkenness might be there held in custody for two years. G. L. c. 279, § 36, as then existing. The amendment to said section effected by c. 715, however, prohibits (with certain exceptions presently immaterial) sentences to the State Farm for any offence except drunkenness. Hence, if the commitment be regarded as following upon a sentence imposed on January 30, 1957, it is clear that it was improper, because of the new statute.

On the other hand, the action of the court in revoking the suspension of the September 1956 sentence, although occurring subsequent to the effective date of c. 715, might properly be regarded not as the imposition of a prohibited sentence but rather merely as an implementation of a sentence properly imposed when first announced (*cf.* Attorney General's Report, 1952, p. 14); in these circumstances, the actual commitment might well be valid. However, if, quite apart from the 1956 amendment, the sentence imposed in September 1956 were then legally improper, it would follow that the commitment concerning which you inquire is likewise invalid.

In my opinion, the original sentence to the State Farm was not lawful. G. L. c. 123, § 112, provides merely that one found guilty of its provisions "shall be punished by fine or imprisonment, at the discretion of the court." The offence being a misdemeanor punishable by imprisonment, and there being no express provision as to the place of commitment, Tango could properly have been sentenced only to a jail or house of correction. G. L. c. 279, § 5. See the "Findings" and the "Judgment" of Mr. Justice Spalding in *McLaughlin v. Commonwealth*, Supreme Judicial Court for Suffolk County, No. 51269 Law (January 16, 1952).

Accordingly, I answer your first question in the negative, without having to reach a determination as to the effect to be given to a revocation, after the effective date of said c. 715, of the suspension of a sentence prohibited by its provisions but in fact *properly imposed* prior to said date. Your second question, of course, needs no answer.

Very truly yours,

GEORGE FINGOLD, Attorney General.

By ARNOLD H. SALISBURY,
Assistant Attorney General.

State Employees — Increase in Compensation to Doctors and Psychiatrists.

MARCH 26, 1957.

Hon. FRANCIS X. LANG, *Commissioner, Commission on Administration & Finance.*

DEAR SIR:— You have requested an opinion of this department regarding the increased payments, provided for by St. 1956, c. 745, for personal services in certain medical positions in the Commonwealth service.

The stated purpose of this act is "to relieve the acute shortage of qualified doctors and psychiatrists" in the Department of Mental Health and in the Department of Public Health. This purpose is sought to be accomplished by providing for a \$1,000 salary increase in certain positions, and by an additional \$1,000 increase if the incumbent of such a position has been certified to possess certain described qualifications.

It is provided in § 1 of this act that the "salary range" of specifically enumerated State positions shall be increased as of October 1, 1956, by \$1,000 above the range in effect on September 30, 1956. It is clear that this section establishes an increased salary for the positions therein described and is for the benefit of the existing incumbent, if any, and also of any future incumbent of such a position.

In § 2 there is a provision that the salary range of the incumbent of each position enumerated in § 1 shall "be increased an additional one thousand dollars beyond the range provided in section one," but only if the then incumbent presents a certification of his qualifications by one of the boards named in this § 2. It is clear that this additional increase of \$1,000 does not always go with the positions set forth in § 1, but is a benefit to go with such position only if the incumbent, present or future, of such position shall present the specified certification of his qualifications.

In my opinion, the \$1,000 increase provided by § 1 is to be applied for the benefit of all present and future incumbents of the positions enumerated therein. The additional increase in § 2 goes with such positions, but only if the incumbent, present or future, possesses the required certified qualifications. These increases are increases above the salary range in effect on September 30, 1956. The salary range on October 1, 1956, is immaterial. These increases are applicable only to the positions listed in § 1, and are to be paid only to persons occupying such positions. It is immaterial that a listed position may have been vacant either on September 30 or on October 1, or that an incumbent may have been appointed to such a position after October 1, 1956.

I believe the above interpretation of St. 1956, c. 745, answers the questions you present.

Very truly yours,

GEORGE FINGOLD, *Attorney General,*

By LOWELL S. NICHOLSON,
Assistant Attorney General.

State Employees — Barrington Plan — Powers of Personnel Review Board.

APRIL 12, 1957.

PERSONNEL REVIEW BOARD.

GENTLEMEN: — You have requested an opinion of this department regarding the powers given to you, by St. 1956, c. 729, § 19A, relative to appeals to you from classifications or allocations under the so-called Barrington Plan.

You present two problems, and you state your own understanding of your powers in each case.¹ You request the advice of this department as to these cases.

1. The board has interpreted the first sentence of the second paragraph of this section [§ 19A] to mean that the board shall entertain appeals in the original form as presented to the Director of Personnel and Standardization.

The sentence in § 19A to which you refer provides: "Said board shall hear all appeals as if said appeals were originally entered before it." In my opinion I believe you are correct in your interpretation. That is, the appeals which are to be entertained by your board are the appeals as to the classification, reclassification, allocation or reallocation to which objection has been made by an employee and as to which he has appealed under § 19 to the Director of Personnel and Standardization and on which the employee is aggrieved by the decision of the director. On such appeals you are limited to the matter which was objected to by the employee and upon which he appealed to the director.

2. The board has interpreted this sentence to limit the board to review only that evidence which accompanied and became part of the original appeal to the Director of Personnel and Standardization.

Although your board is limited in its consideration to the classification or allocation objected to by the employee, there is no limit as to the evidence which you can receive, if such evidence is relevant to the question before you. Since you are to consider each appeal on the merits as if said appeal "were originally entered" before your board, you are therefore entirely free to decide what evidence and arguments you will receive at the hearing. Accordingly, I do not agree with the interpretation made by your board and contained in your statement.

Very truly yours,

GEORGE FINGOLD, Attorney General,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

¹ See opinion on a related matter, *infra*, page 90.

State Employees — Retirement — Successive Periods of Public Service, and Right to Pension for Each Period — Members of General Court — Police Officer.

APRIL 15, 1957.

Hon. JOHN F. KENNEDY, *Chairman, State Board of Retirement.*

DEAR SIR: — You have requested my opinion with respect to three different situations in which applications for contributory retirement benefits have been presented to your board by employees of the Commonwealth.

My conclusions set forth below are not to be taken to indicate personal approval or disapproval of the broad coverage of our State retirement laws. In answering your requests for these opinions I have studied and interpreted the applicable laws as they stand upon our statute books. As the Attorney General of the Commonwealth I have a duty and an obligation to interpret the laws as they exist, without regard to my personal opinion as to the merit of these statutes. The fact that, in my opinion, our State retirement laws may in certain instances be too broad or too generous cannot affect the required legal interpretation of the statutes which control the situations presented by you.

The first situation which you present concerns applications for superannuation retirement received by your board from seven persons who were elected and have served as members of the Massachusetts House of Representatives for the sessions of 1955 and 1956. These seven applications were received by your board during October 1956. Each of the seven applicants requested that he "be retired as of November 1, 1956." That date, as to six of the applicants, was after the maximum age of seventy years had been reached, and was about two months before the end of the two-year term for which they were elected in 1954. Retirement benefits and pension rights for these members of the General Court, in accordance with the provisions of §§ 1 to 28, inclusive, of c. 32 of the General Laws, were restored and granted by St. 1955, c. 554, § 2.

Your request for an opinion on this first situation is as follows:

"The State Board of Retirement respectfully requests your formal opinion as to whether or not the board may accept applications for retirement from these members of the General Court with such retirements to be effective as of November 1, 1956, notwithstanding their terms of office do not expire until the first Tuesday of January 1957."

For the reasons set forth below, I answer your question in the affirmative.

Ordinarily, retirement for superannuation is automatically effective "upon attaining the maximum age" (G. L. c. 32, § 5 (1) (a)), and the applicant has no right to select another date. But for the applicants in the present case the retirement was not automatic at age seventy because the statute provides that persons "holding office by popular election at the time of attaining the maximum age . . . may continue to serve in such office . . . until the expiration of the term for which he was elected." C. 32, § 5 (1) (d).

The question presented in this case is whether the above right of these applicants to "continue to serve" beyond maximum age, but not beyond the end of the then current term, gives them the privilege to select as the effective date of retirement some date between these two extremes of maximum age and the end of the term. In two instances, the Legislature

has expressly given this right to select a date for retirement. If a member of a retirement system is over fifty-five years of age and is under the maximum age, he shall be retired for superannuation "as of a date which shall be specified" in his application. C. 32, § 5 (1) (a). By a recent statute a teacher who attains maximum age during the school year may remain in service until the end of the year, and the right is expressly given to such teacher to select any date after attaining maximum age and not later than the end of the school year as the effective date of retirement. C. 32, § 5 (1) (f), as added by St. 1954, c. 348.

The rights of the present applicants are not made clear by the statutes. For these persons, retirement for superannuation is not automatic at the maximum age; they "may continue to serve." However, no right is expressly given to them to select a date for retirement. Does this mean that these applicants can be retired only on two possible dates, the date of attaining maximum age, or the date of the end of their term of office? In my opinion, these are not the only available alternatives. The provision for remaining in service is permissive — such a person "may" continue. The fact that continuance of service beyond maximum age is actually entered upon does not, in my opinion, mean that the applicant is thereafter to be compelled to continue to serve up to the very end of his term of office. Such compulsion of service is not suggested by the statute, nor does it seem a reasonable or necessary construction. Since retirement at maximum age is not automatic or compulsory, and since the right to "continue to serve" is permissive, it is my opinion that these applicants can select any date within these two extremes as the date when retirement is to be effective. The absence of express statutory permission to specify the date of retirement, even in the light of such permission being given expressly to other groups, does not in the circumstances of this case — i.e., where retirement is not automatic and where there is no requirement that the term must be served out in full — require a ruling that the right to specify a date for retirement does not exist.

The above ruling that your board may accept these applications and that they are effective on November 1, 1956, which in turn means that payment of retirement allowances shall start as of that date (§ 5 (2) first paragraph), does not mean that these persons will receive double pay for the remaining two months of their term of office. The full compensation received by these representatives, paid prior to November 1, 1956, was for the 1956 "session" (c. 3, § 9), which session ended on October 6, 1956; such compensation for their legislative services was not for the months of November and December, nor for the calendar year 1956. Furthermore, after November 1, 1956, these men were not representatives; their status as representatives had come to an end by virtue of their retirement. The termination of their status as representatives occurred when they "retired" from that position. This is the result of the obvious and common meaning of "retirement." Such termination of their status as representatives is implicit in the definition of "member in service" (§ 3 (1) (a) (i)), and particularly in the statement in that paragraph that "separation from the service becomes effective by reason of his retirement, resignation, failure of re-election," or for other reasons.

The further fact that some of these representatives were elected on November 6, 1956, to serve anew as members of the House of Representatives, and that they will therefore be entitled during 1957 and 1958 to receive both their retirement allowance and also their compensation as

representatives, has no bearing on the question you ask. The Legislature has seen fit to provide that a person receiving a retirement allowance shall also be paid "for service in a public office to which he has thereafter been elected by direct vote of the people." C. 32, § 91. This mandate and public policy of the Legislature that the voluntary choice of the people to select their representatives for office shall not be restricted because a person is on retirement, is binding on all executive officers of the Commonwealth. This provision for double compensation — both salary and retirement allowance — cannot alter the interpretation of the general statutes which entitle these representatives to retirement.

The legal position of the one representative who had not reached the maximum age of seventy years on November 1, 1956, is the same as that of the six other representatives. If anything, his position may be stronger because of the express provision in § 5 (1) (a) that a person over fifty-five years and under the maximum age shall be retired "as of a date which shall be specified" in the application.

The second matter upon which you request an opinion is as follows:

"Your formal opinion is also respectfully requested as to whether or not the State Board of Retirement is obliged to pay a retirement allowance to one of those representatives noted above, notwithstanding the fact that at the present time, he is receiving a retirement allowance from the Teachers' Retirement System based on his service in one of the towns of the Commonwealth."

You inform me that this representative, after thirty-six years of service as a teacher in our public schools, retired for superannuation at the age of sixty-nine years, and that under the general statutes relating to retirement he is entitled to and is now receiving an allowance from the Teachers' Retirement System. After retirement as a teacher this person was elected a member of the House of Representatives and he has served as such for the past ten years. During this second period of public service he has received both his teacher's retirement allowance and his salary as representative. This is permitted by c. 32, § 91. This representative, as well as the six other representatives covered by your first inquiry, has now applied for a retirement allowance based upon his ten years of service as a member of the House of Representatives.

This second inquiry is whether or not this representative is now entitled to an additional retirement allowance based upon his more recent period of service as a member of the Legislature. The answer to this question is in the affirmative. This representative, in common with all of the other representatives covered by your first inquiry, became a member of the State Employees' Retirement System under the provisions of St. 1947, c. 660. This membership was lawful and complete, and the member has made the required contributions and has complied with all the other requirements of the retirement laws. Therefore, by the provisions of St. 1955, c. 554, which restored and granted pension rights to members of the General Court, he is entitled to the retirement allowance provided by c. 32, §§ 1 to 28.

The third situation upon which you request an opinion relates to an application for retirement for ordinary disability, under G. L. c. 32, § 6, made by a State employee fifty-four years of age who, since May 1, 1939, has worked at the Massachusetts Reformatory, now the Massachusetts Correctional Institution, at Concord, as a correction officer, or prison guard, and who has become disabled for further duty.

You advise me, however, that this employee had formerly been a police officer in the service of the city of Springfield, that he was retired for disability by the city of Springfield on August 1, 1936, and that ever since that time he has been paid a pension of \$28.69 per week because of such disability. The retirement by the city of Springfield was granted under the provisions of G. L. c. 32, § 83, as those provisions appear in the Tercentenary Edition. The conditions for retirement under § 83 at that time were that the employee must have been a "member of the police department," he must have become "disabled for useful service in said department," and he must have been certified by the city physician "to be permanently disabled, mentally or physically, by injuries sustained through no fault of his own in the actual performance of duty, from further performing duty as such member." These conditions were met by the employee in question, the retirement was granted, and the disability pension is still being paid to him by the city of Springfield.

Notwithstanding the above facts, this employee has now applied for ordinary disability retirement from his present Commonwealth service under the provisions of G. L. c. 32, § 6. The conditions for allowance of disability retirement under this section are that the employee must be a "member in service," that he must have become "totally and permanently incapacitated for further duty before attaining age fifty-five and after completing fifteen or more years of creditable service," and that "such incapacity is likely to be permanent." You advise me that this employee has been a member of the State Employees' Retirement System, that the required retirement deductions from his pay have been made, and that he meets the tests for incapacity set forth in § 6. There is no requirement in this section, as there is in §§ 7, 9, 83, and in many other sections, that the disability must have resulted from the performance of his duties.

Upon these facts, you request my opinion on the following question:

"May we respectfully request your opinion as to whether or not this employee has the right to be retired by the Commonwealth on the basis of his application for ordinary disability retirement or on any basis."

Employment by the Commonwealth in 1939 of this retired police officer was lawful. Although employment of such a person would be unlawful at the present time, under the present provisions of G. L. c. 32, § 91, the provisions of that section as they stood in 1939 provided only that a person receiving a pension or retirement allowance from the Commonwealth or from any county, city or town could not be paid for services rendered "to the commonwealth, county, city or town which pays such pension or allowance." St. 1938, c. 439, § 5. It was not until 1941 that the prohibition against payment for services of a pensioner was made applicable to all governmental units, rather than merely to the unit which was paying the pension. St. 1941, c. 670, § 24. The 1941 amendment stated specifically (§ 26) that the extended prohibition did not render illegal the continued employment of any person who, upon the effective date of the act, was legally employed.

Nor did the provisions of § 83 providing for the retirement of the police officer from his Springfield position prevent him from taking a new position and receiving compensation for the work performed. On the contrary, § 86, as in force at the time, by stating that any such retired police officer "who accepts another appointment or employment as a police officer or

police official" would lose his pension, impliedly authorized the police officer here in question to take any other kind of employment. The officer's employment as correction officer, with custodial and disciplinary duties, was not employment as a police officer or as a police official.

Furthermore, I know of no law which prevents a person who is "disabled for useful service" in a police department from being employed in some other kind of public service if he meets all the requirements which may exist for that second employment and if an employing officer desires to hire him.

Some question might possibly exist as to the duty of the city of Springfield to continue a pension to this retired police officer — see in this connection St. 1938, c. 277, § 2; St. 1939, c. 264; St. 1946, c. 576, §§ 3, 7; St. 1949, c. 562; St. 1950, c. 395; *Moffatt v. Mayor of Lowell*, 215 Mass. 92; *Foley v. Springfield*, 328 Mass. 59 — but this question does not affect your obligation to pay the applicant the ordinary disability retirement provided by § 6.

In summary, this third situation shows lawful employment of the applicant during the past seventeen or eighteen years, with full compliance with the requirements of the State Employees' Retirement System, and with a present condition of total and permanent incapacity which brings him within the benefits of c. 32, § 6. Since his employment by the State has been lawful, since he has complied with all requirements for ordinary disability retirement, and since there is no statute which forbids payment to him of benefits under § 6, no other conclusion can be reached but that he is now entitled to such benefits.

In the cases covered by your second and third inquiries, for service which is permitted by § 91, and where there is compliance with all the pertinent requirements for retirement, the statutes of the Commonwealth entitle these State employees, who have rendered two separate, successive periods of lawful public service, to receive the retirement allowance granted by the Legislature for each period of service. Such concurrent retirement allowances are not prohibited by the provision in G. L. c. 32, § 3 (7) (g), that a person who is retired "shall receive only such benefits as are allowed or granted by the particular provisions of the law under which he is retired." These persons have been granted benefits by two separate "particular provisions of the law." These persons are therefore entitled to receive such benefits.

In this Commonwealth retirement benefits are granted to public employees if and when they comply with the various statutory conditions and restrictions which have been established by the Legislature. In each of the three situations set forth above, the facts which you present show that the applicants have performed lawful public service, that they have become members of the State Employees' Retirement System, that they have paid their required contributions to that system, and that they have met in full all other conditions relating to the retirement allowances for which they have made application. I find no statute or rule of law which prohibits the payment of these requested retirement benefits. By reason of these facts, and on the basis of the statutes applicable, these applicants as a matter of law are entitled to receive the retirement benefits which have been granted to them by the Legislature.

Very truly yours,

GEORGE FINGOLD, Attorney General.

Employees of Lowell Technological Associates, Inc.—Operation of Bookstore at Lowell Technological Institute—Eligibility for Membership in State Retirement System.

MAY 20, 1957.

Mr. EVERETT V. OLSEN, Assistant to the President, Lowell Technological Institute.

DEAR SIR:— You have requested an opinion of this department with reference to the status, as State employees, and with reference to eligibility for membership in the State Retirement System, of the employees of Lowell Technological Associates, Inc., a corporation which operates your bookstore.

You present the following facts: The Lowell Technological Associates, Inc., was incorporated on December 1, 1934, as a non-profit corporation under G. L. c. 180. Management of this corporation rests with seven regular members, four of whom shall be members of the instructing staff or officers of the Lowell Technological Institute, two shall be alumni of the Lowell Technological Institute, and one an undergraduate of Lowell Technological Institute. This corporation operates the bookstore at the Lowell Technological Institute where students purchase books and supplies for use in their study, and it operates the mailroom where students pick up their mail, and it also operates a revolving Student Loan Fund for the benefit of the students of the Institute. State-owned facilities are used for the bookstore and mailroom, but the furniture and equipment have been purchased by the corporation. The only funds received by the corporation from the Institute consist of two dollars per student annually for use of mailroom facilities. This money is paid to the corporation by the trustees of the Lowell Technological Institute from the funds received by the trustees from student activities under G. L. c. 75A, § 2. These receipts constitute only a very small portion of the total receipts of the corporation. The employees of the corporation are paid by the corporation from corporation funds. The books of the corporation are audited periodically by auditors from the office of the State Auditor. The corporation employs three full-time and three part-time people. The part-time people are students at Lowell Technological Institute.

You request an opinion as to whether the full-time employees are State employees within the meaning of the State retirement laws.

In my opinion, the full-time employees of the Lowell Technological Associates, Inc., are not employees of the State, and for that reason such employees are not eligible for membership in the State Retirement System. They are employees of a Massachusetts corporation which is a body corporate separate and apart from the Commonwealth. *Opinion of the Justices*, 261 Mass. 523, 550. *Horton v. Attorney General*, 269 Mass. 503, 512. The facts that a small portion of the corporation's income is received from a State school, that its books are audited by the State Auditor, and that the purposes of its existence relate to such State school and assistance to its students and alumni, do not make the corporation a division or agency or instrumentality of the Commonwealth, nor make the corporation's employees employees of the State. As a matter of law, the Lowell Technological Associates, Inc., "is a juristic entity which is legally separate and distinct from the commonwealth . . . and whose employees are not by

virtue of their relation to such juristic entity employees of the commonwealth" G. L. c. 118C, § 2 (f).

For the above reasons, in my opinion, the employees of the Lowell Technological Associates, Inc., are not State employees and are not eligible for membership in the State Retirement System.

Very truly yours,

GEORGE FINGOLD, Attorney General,

By LOWELL S. NICHOLSON,
Assistant Attorney General.

Veterans Non-Contributory Retirement — Creditable Service — Dishonorable Discharge followed by Re-enlistment and Honorable Discharge.

May 27, 1957.

Hon. FRANCIS X. LANG, *Commissioner, Commission on Administration and Finance.*

DEAR SIR: — You have requested my opinion concerning the amount of creditable service which can be allowed to a certain State employee who has applied for non-contributory retirement as a veteran under the provisions of G. L. c. 32, § 58.

You present the following facts:

"This employee began public service on July 1, 1924, and he had over seventeen years of creditable service when he was commissioned a First Lieutenant in the United States Army on May 9, 1942. He served until June 16, 1945, when he was dismissed as the result of a trial by a General Court Martial for violation of the 93rd, 95th, and 96th Articles of War. On June 11, 1946, he re-entered the United States Army and was honorably discharged on March 31, 1947. He returned to State service on May 19, 1947, twenty-three months after his dismissal as an officer."

Your letter assumes that the employee in question is a "veteran" within the meaning of G. L. c. 32, §§ 58, 58A. I agree with this assumption. G. L. c. 4, § 7, cl. 43rd; c. 31, § 21 (see both versions: St. 1951, c. 663, and the later amendment in St. 1954, c. 627, § 3); c. 32, §§ 1, 56, 58A. The provisions of St. 1941, c. 708, § 26, and other sections, do not, in the circumstances of the present case, require a different conclusion.

Since this employee is a veteran, the only question upon which you request an opinion is the amount of "creditable service" which is to be given to him. Your request is as follows:

"Your formal opinion is therefore respectfully requested as to whether the period between May 9, 1942 and June 16, 1945 is creditable service, even though the veteran was dismissed from military service by General Court Martial for the violation of the Articles of War mentioned above."

I answer your inquiry in the affirmative.

The amount of creditable service to be allowed in the present case is determined by c. 32, § 58A. That section provides that a State employee who is a veteran shall be given creditable service for —

" . . . the period of his wartime service until the date of his discharge or release from such service, which shall include credit for any actual service in the armed forces between January first, nineteen hundred and forty, and July first, nineteen hundred and fifty-five."

The only basis upon which it could be ruled that this employee is not entitled to credit for the time of his first period of service is that that first period was terminated by a dishonorable discharge. Such conclusion is not called for by the statutes which apply to the present case. It is specifically provided in § 58A that a person who is a "veteran" shall be given creditable service "which shall include credit for any actual service in the armed forces" between two dates which include the entire period in question. It is not in words specified in this statute, nor in any other statute, that creditable service under this § 58A shall not be given if the service was terminated by dishonorable discharge. Nor can such an implication or intention be read into the literal language of this statute. We are required to follow the statute as clearly written by the Legislature, and not to change it because of some circumstances called to our attention which possibly had not been called to the attention of the Legislature. In the present case, furthermore, it seems probable that this kind of a situation had been considered by the Legislature (see definition in G. L. c. 4, § 7, cl. 43rd). It is in just this kind of an inquiry that the rules of statutory interpretation, which call for the application of the clear and literal words of the statute itself, should be applied.

This conclusion is confirmed by the definition of the word "veteran" in the various provisions that have been adopted as the basis of retirement and creditable service under § 58. In G. L. c. 4, § 7, cl. 43rd, a veteran is defined as a person "whose *last* discharge or release . . . was under honorable conditions . . ." (Italics are supplied.) This same clause also states, in subdivision (f) of the ninth paragraph, that "any person whose *last* discharge or release from the armed forces is dishonorable" shall not be deemed to be a veteran. The inclusion as a veteran of a person "whose last discharge . . . was under honorable conditions" makes it clear that the test of the right to credit toward retirement for the period spent in military service is the nature of the *last* discharge. This provision suggests something in the nature of condonation if a period of actual service ending by a dishonorable discharge is followed by a subsequent period ending by an honorable discharge. This suggestion is confirmatory of the adoption of a literal interpretation of § 58A by which creditable service is to be given to this employee for his "actual service."

Accordingly, I advise you that, in my opinion, and under the circumstances of this case, the employee in question is entitled to creditable service, upon his application for retirement under G. L. c. 32, §§ 58, 58A, for the period from May 9, 1942 to June 16, 1945.

Very truly yours,

GEORGE FINGOLD, Attorney General.

Secretary of the Commonwealth — Right of Retired First Deputy Secretary to Payment in Lieu of Unused Vacation Time.

MAY 28, 1957.

Hon. EDWARD J. CRONIN, *Secretary of the Commonwealth.*

DEAR SIR:— You have requested my opinion regarding payment of money in lieu of unused vacation time to your former first deputy who has now retired.

The problem you present is not answered by G. L. c. 29, § 31A (b). That statute relates only to employees of the Commonwealth, not to officers. The first deputy secretary is a public officer (*Howard v. State Board of Retirement*, 325 Mass. 211), and he is appointed, by constitutional provision, by the Secretary, without requirement of approval by the Governor and Council. Mass. Const., c. II, § IV, Art. II. Also, G. L. c. 9, § 2. See unpublished opinions of this department to Commissioner of Administration dated May 19, 1950, and March 4, 1952.

Your specific inquiry is whether or not the retired first deputy is entitled to pay for unused vacation allowance under paragraphs LV-8, G-5 and G-6 of the Rules and Regulations governing vacation time (1956) authorized under G. L. c. 7, § 28. The Director of Personnel and Standardization, subject to approval of the Commission on Administration and Finance, is authorized by the second paragraph of this § 28, as last amended by St. 1954, c. 680, § 2, to make rules which shall regulate vacation leave. These rules are applicable, not only to employees of the State, but also to "officers other than those exempted by such rules." Pursuant to this authority rules have been adopted and are now in force (July 1, 1956, edition) regulating vacation leave and also indicating the officers who are covered or who are exempted by such rules. The regulations stating which officers are exempted from these rules are contained in Rules G-5 and G-6. A careful reading of these rules makes it clear that the first deputy secretary is not exempted.

Accordingly, in my opinion, the rules and regulations issued under c. 7, § 28, are applicable to the retired first deputy secretary. Therefore, the retired first deputy secretary is entitled, under Rule LV-8, to payment in lieu of unused vacation time. The amount of vacation time to which he was eligible is determined by Rule LVI.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Rates of Compulsory Automobile Insurance — Additional Premiums after Smaller Tentative Rates are Annulled by Court.

MAY 28, 1957.

To the House of Representatives:

I have the honor to acknowledge the receipt of an order adopted by the House of Representatives on May 22 last, requiring the opinion of the Attorney General upon certain questions therein stated. Said order is as follows:

"Ordered, That the Attorney General of the Commonwealth be forthwith requested by the House of Representatives to render an opinion to be delivered to the Speaker and the Clerk of the House of Representatives at the earliest possible date, on the following questions:—

"1. Can an insurer who, in the current year, has issued a compulsory motor vehicle liability policy to an insured and who has collected therefor the premium charges originally established by the Commissioner of Insurance require the payment of any additional premium charges which said commissioner may fix as a result of the recent decision of the Supreme Court if said insurer has not by notice, endorsement on the policy issued, or otherwise reserved the right to collect such additional premium charges?

"2. Can such an insurer require the payment of such additional premium charges if the right to collect the same was reserved by the insurer by notice, endorsement on the policy issued, or otherwise?"

The Commissioner of Insurance on September 26, 1956, filed in his office tentative rates for compulsory automobile insurance for the year 1957, and later, on November 21, 1956, after hearing, fixed and established the rates for 1957 in accordance with the provisions of G. L. c. 175, § 113B. The propriety of his rates was challenged by a petition for review in the Supreme Judicial Court for the County of Suffolk as provided by § 113B, brought by several insurance companies. The case was heard by a single justice of said court and reported and reserved by him without decision for the consideration of the full court which, on May 3, 1957 (see *American Employers' Ins. Co. v. Commissioner of Insurance*, 335 Mass. 748) ruled that the order of November 21, 1956, must be annulled ". . . and new rates, adequate, fair, reasonable and non-discriminatory . . ." must be substituted by the Commissioner as soon as may be. (Pages 756-757.) In its decision the court used the following language at page 750:

"Where the duty is imposed upon a public official by statute to establish a rate that is 'adequate, just, [and] reasonable,' G. L. (Ter. Ed.) c. 175, § 113B, it is our duty to see that a rate of that description is promulgated by him."

Moreover, the court said at page 755:

"It was known to the petitioners and the respondent prior to fixing the rates for 1957 that the average loss cost increased from \$19.22 per car year in 1948 to \$31.71 in 1955. The underwriting loss sustained by the companies for the year 1955 on the evidence in the record can be easily represented as follows:

Premiums		\$60,501,912
Losses developed	\$45,649,868	
Expenses	20,028,519	
Losses and expenses		65,678,387
Underwriting loss		\$ 5,176,475

That was the most recent full year that the parties had from which to draw their experience with respect to the preparation of the 1957 rates. All the data, including the most recent reports prior to October 25, 1956, which it was possible for the bureau to submit to the Commissioner, showed that 1956 would prove a worse year than did 1955. If the rates for 1957 are established at the same pure premium or low level cost as the 1956

rates, the petitioners calculate that the full year will result in a loss of approximately \$9,000,000. The implications of facts which are of common knowledge point in the same direction."

As has been seen, the 1957 rates were not finally established until over four months after the 1957 policies were required to be written to enable owners to operate their cars after January first. In the meantime, presumably, policies were written and bills for premiums issued and paid.

Subsequent and pursuant to the decision of the full court, the commissioner established finally the 1957 rates on a basis substantially higher than before. Naturally some perplexity has been caused as to the responsibility for the later and higher rates.

The General Court has left very little, if any, room for judicial construction of its purpose in this situation. The situation which has come to pass was foreseen by your honorable body some twenty-five years ago when it enacted St. 1930, c. 343, entitled "An Act relative to Classifications of Risks and Schedules of Premium Charges under the Compulsory Motor Vehicle Liability Insurance Law, when delayed in becoming effective." The body of this statute is now found in G. L. c. 175, § 113B, and reads as follows:

"If, for any reason, classifications of . . . premium charges fixed and established as aforesaid on or before September fifteenth in any year for the ensuing calendar year are not effective for the said year, the classifications of . . . premium charges in effect for the then calendar year shall remain in full force and effect, and shall be used and charged in connection with the issue or execution of motor vehicle liability policies or bonds for said ensuing calendar year until classifications of . . . premium charges for said ensuing calendar year are finally fixed and established. Classifications of . . . premium charges when finally fixed and established for said ensuing calendar year shall become effective as of January first of said year, and all premium charges affected by any change thereby made which have been paid or incurred prior to the time when such charges are finally fixed and established shall be adjusted in accordance with such change, as of said January first." (Emphasis supplied.)

So it is seen that the General Court has, with clarity, fixed and determined the method of assessment of premiums in the cases you refer to, the amounts of the same and the method of adjustment of charges when the premiums have been modified in the statutory manner. Contractual arrangements between the parties involved are subject to this law. It controls the relations of all with each other. It is, in my opinion, a valid law. *Lorando v. Gethro*, 228 Mass. 181. The only remedy open to the Legislature is repeal or amendment of the existing statute.

In my opinion the answer to both your questions must be in the affirmative.

Respectfully submitted,

GEORGE FINGOLD, Attorney General.

Tewksbury State Hospital — Ownership of "Patient's Canteen Fund."

MAY 29, 1957.

Hon. PATRICK A. TOMPKINS, *Commissioner, Department of Public Welfare.*

DEAR SIR: — You have requested my opinion as to whether or not the Commonwealth is the owner of and can control the proceeds of the Community Store at the Tewksbury State Hospital and Infirmary and the funds in the "Patients Canteen Fund" which have come from the operation of such store.

You state that the canteen was organized, owned and managed by the Employees Group at the Tewksbury State Hospital and Infirmary, but that in May of 1954 the Employees Group made a gift of the canteen to the trustees of the Tewksbury State Hospital and Infirmary with the condition that the proceeds from the canteen be continued to be paid into the "Patients Canteen Fund." The trustees by vote accepted the gift with its condition, and beginning in 1955 the trustees have operated the canteen through a so-called "concessionnaire," and the payments from the "concessionnaire" have been paid directly into the Patients Canteen Fund. You further state that the trustees have now been requested by the Auditor of the Commonwealth and the Comptroller of the Commonwealth to turn over money received from this canteen to the general fund of the Commonwealth upon the ground that such money constitutes income of the Commonwealth and that it is not available for expenditure without appropriation by the Legislature.

Upon these facts you request an opinion on the following question:

"Under the terms of the vote of the trustees in accepting this gift from the Employees Group may they continue to use the proceeds from this canteen in the Patients Canteen Fund?"

The answer to your question depends upon an analysis of the detailed facts relating to the origin and the past and present operations of this canteen. The mere fact that it is a canteen operated in a State institution is not, by itself, a sufficient basis upon which to answer your question of law. There are many canteens in State institutions. (Some other "canteens" are those in the institutions of the Department of Correction, the Department of Mental Health, in the Soldiers Home in Chelsea and Holyoke, and at the State Teachers Colleges at Worcester and Lowell; concessions at State airports; also, the bookstores at the University of Massachusetts and at the Lowell Technological Institute; and many others.) Some of these "canteens," or by whatever name they are called, are controlled by statutes, or by department regulations; all of them could be so controlled. In the absence of statutes or regulations, the answer to the question whether funds or income of such canteens belong to the Commonwealth depends upon the facts in each case. On varying factual situations it has been ruled that the bookstore at the University of Massachusetts belongs to the Commonwealth, but that the bookstore at the Lowell Technological Institute does not. See Opinion of the Attorney General to Department of Industrial Accidents dated December 11, 1956, and Opinion of the Attorney General to Lowell Technological Institute dated May 20, 1957.¹

¹ See *supra*, pages 43 and 80.

In the present case no statute or regulation is applicable. The "Patients Canteen Fund" involved here is not the "Patients' Funds" governed by G. L. c. 122, §§ 2, 2B and 2C. The answer to your question, therefore, requires a detailed statement of all facts relating to the Patients Canteen Fund. Such a detailed statement has been supplied to me. In substance, the facts relating to this Patients Canteen Fund are as follows:

The Community Store, or canteen, at the Tewksbury State Hospital and Infirmary, Tewksbury, Massachusetts, was started in 1922 or 1923, through the efforts of the employees and staff at the hospital. Money needed to start the store was contributed by these persons as individuals. No money in any way came from the Commonwealth. The Community Store was operated by the "Employees Group" (an unincorporated association) from 1923 until 1954. The purpose of the operation of the Community Store has been to obtain funds for the benefit of patients. Profits from the store were placed in the "Patients Canteen Fund," sometimes called the "Community Store Fund." During these years the method of operation of the Community Store has been as follows: The use of space in the hospital building, and also electricity, heat and water, have been furnished without charge. Purchases of stock and store equipment were made from store funds, not from State money. The labor required to operate the Community Store was furnished by the employees, outside their regular working hours, through the organization called the Employees Group.

Over the past thirty years considerable profit has been made from the store. All of this has gone into the Patients Canteen Fund.

In 1954 there was discussion as to a change in the method of operation of the Community Store. But it was understood and stated by all persons involved that the purpose of the operation of the store, for the benefit of the patients of the hospital, would remain the same. It was decided that the store, stock and equipment should be turned over to the trustees of the hospital, that the store should be run by an outside person as a "concessionaire," and that the amount paid by the outside person should go into the Patients Canteen Fund. Accordingly, the Employees Group, by formal vote on May 7, 1954, made a gift to the trustees of the store and its stock and equipment. The vote recited: "This vote was taken with the understanding that the Trustees will continue the operation of the store and commissary and devote the profits therefrom to the Community Store Fund," and that the trustees could rent the store "so long as the rental and the money derived from the sale of the merchandise on hand at time of transfer are devoted to the Community Store Fund."

The gift from the employees was accepted by vote of the trustees of the hospital on May 12, 1954. The vote stated: ". . . it was voted to accept from the Employees Group the store and commissary now operated by them and to continue its operation in accordance with the vote of said Employees Group and to devote the profits therefrom to the Community Store."

Following the above dealings, and by direction of the trustees, the superintendent obtained one McCabe to operate the store, and on April 25, 1955, a written agreement was entered into between McCabe and the trustees of the hospital. This agreement provided that McCabe would be permitted to operate the Community Store located on the premises of the hospital for a term of three years. The trustees agreed to furnish McCabe, without cost, electricity, heat and water (and, impliedly, space in which to

run the store), and also the use of the soda fountain, ice cream cabinet and other store equipment. The agreement required McCabe to purchase at cost all merchandise on hand. It was then provided:

"In consideration of such authorization and permission, the party of the second part (McCabe) agrees to donate to the Patients' and Employees' Fund of the Tewksbury State Hospital and Infirmary an amount each month in the sum of Three Hundred and Five Dollars (\$305.00)."

Your question concerns the above \$305 paid each month by McCabe.

It seems clear, on the above stated facts, that, prior to the change in 1954, the profit obtained from the operation of the Community Store belonged to the Employees Group, and did not constitute income or assets of the Commonwealth. It would seem that prior to the change in 1954 there could be no legal objection to the Employees Group placing this profit in the Patients Canteen Fund, and that up to that time the Commonwealth had no claim to such fund. The change in method of operation in 1954 and 1955, in my opinion, did not change the legal situation. The change in operation was merely to substitute operation by McCabe for voluntary operation by the Employees Group, and to provide for an exact and definite sum of money each month, instead of the varying and uncertain amounts earned by the Employees Group. These monthly proceeds from the operation of the store, whether they be considered as rentals or donations, and also the funds and assets of the store, in my opinion, are held by the trustees of the Tewksbury State Hospital and Infirmary, under the powers given to them by G. L. c. 122, § 2A, and subject to the conditions upon which the gift from the Employees Group was made to the trustees.

For the above reasons, and upon the exact facts in this case, it is my opinion that the trustees of the Tewksbury State Hospital and Infirmary may continue to have the monthly payments received from McCabe paid directly into the Patients Canteen Fund and used, without appropriation or action of any kind by the Commonwealth, for the benefit of the patients at the Tewksbury State Hospital and Infirmary.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

Department of Public Works—Construction of Underpass under State Highway Connecting Two Parts of a Private Shopping Center.

JUNE 3, 1957.

Hon. CARL A. SHERIDAN, *Commissioner of Public Works.*

DEAR SIR:— You have presented the following facts to this office and have requested advice thereon. The North Shore Shopping Center has purchased several hundred acres of land on either side of Route 128 in Peabody near the Andover Street interchange at a location where Route 128 has been laid out under limited access provisions. The said North Shore Shopping Center is presently developing a large shopping area on either side of the route, and desires to construct or have constructed at its expense an underpass to allow passage for vehicles and pedestrians under Route 128 from the shopping area on one side of Route 128 to the area on

the other side of the route. At present the two areas are connected by a small cattle pass which passes under Route 128. The proposed new passage at approximately the location of the cattle pass will have no direct access to Route 128.

The underpass is designed to help reduce the flow of traffic on the regular 128 interchanges in that vicinity which would otherwise be used by persons passing from one side of the shopping area to the other.

General Laws c. 81, § 7C, provides in part that "all of the provisions of law in regard to the laying out, relocation, alteration or discontinuance of state highways and to damages therefor shall apply to limited access ways." Chapter 81 gives adequate powers to the department concerning layout, relocation and alteration of State highways. Subject to the limitations therein set forth (which it does not appear necessary to discuss here) the department may alter the layout of Route 128, a limited access highway, and may make provision for the described underpass.

In connection therewith it is noted that the land on which the proposed underpass is to be located passing under Route 128 is land owned in fee by the Commonwealth. The cattle pass which you say exists at this location is authorized by G. L. c. 81, § 7D, which provides that: "The department may grant easements within state highway locations for wires, pipes, poles, conduits and cattle passes."

The statute in question does not authorize easements for purposes other than those mentioned. The proposed underpass, therefore, should not be laid out as a private easement for the benefit of the Shopping Center and its customers. The underpass, instead, should create an easement for the benefit of the general public as do other public ways. To accomplish this result, public ways should extend from either end of the underpass connecting it with other public ways in the vicinity.

In the manner outlined above, the department will be able to keep control over the underpass for purposes of maintenance and repair and will be using State land for a public purpose rather than merely for the private benefit of the Shopping Center.

In relation to the cost of financing the structure, you state that the Shopping Center is willing to undertake the entire cost of such construction. It is suggested that the construction be carried out by contractors under the supervision of the department as in the case of other highway projects. A clause may be inserted in the bids and in the awarded contract to the effect that the credit of the Commonwealth is not pledged and that the contractor shall look only to the Shopping Center for reimbursement. A bond should be required from the Shopping Center to protect the Commonwealth and the selected contractor. The mechanics of this procedure may better be explored by further consultations between officials of your department and this department.

Your letter mentions the possibility of issuing a permit to the Shopping Center under the provisions of G. L. c. 81, § 21. Such a permit might be a way of authorizing the construction involved where the Shopping Center would award the contract rather than the State Department of Public Works. The permit issued thereunder, however, would not authorize the creation of a private easement in behalf of the Shopping Center. The easement problem would have to be solved somewhat in the manner outlined above whereby a public easement would be created.

In conclusion, it appears that the department has power to alter the layout of the limited access highway Route 128 to provide for the under-

pass in question provided that the underpass creates a public easement rather than a private easement. The construction may be done by the department with funds supplied by the Shopping Center or, in the alternative, the construction may be carried out under a permit issued in accordance with c. 81, § 21.

Very truly yours,

GEORGE FINGOLD, *Attorney General.*

State Employees — Barrington Plan — Powers of Personnel Review Board.

JUNE 6, 1957.

PERSONNEL REVIEW BOARD.

GENTLEMEN:— You have requested an opinion of this department, supplementing the opinion given in our letter to you dated April 12, 1957,¹ relative to appeals to you from the classifications or allocations under the so-called Barrington Plan. St. 1956, c. 729, § 19A.

In addition to the two problems covered in the earlier opinion, you request the advice of this department as to a third problem, as follows:

The board has interpreted the first sentence of the second paragraph of St. 1956, c. 729, § 19A [“Said board shall hear all appeals as if said appeals were originally entered before it.”] to mean that the board is not authorized to create new job titles or new classifications.

The Legislature, by St. 1956, c. 729, put into effect, as of October 1, 1956, a new and increased pay plan of the Commonwealth, known as the Barrington Plan. This plan provided an entirely new set of classifications and titles for a classification plan for the Commonwealth, and new allocations of positions to the classifications and to salary groups. Because of the numerous changes made in prior classifications and allocations, the Legislature provided for two consecutive appeals by State employees. The purpose of these appeals was “to provide for adjustments which may be necessary in the initial allocation to the new pay plan.” § 19. The first appeal was to the Director of Personnel and Standardization. The subsequent appeal was to your Personnel Review Board, established by § 19A. With reference to these second appeals, it was provided that your board “shall hear all appeals as if said appeals were originally entered before it.” You request an opinion of this department as to whether or not this quoted sentence authorizes your board “to create new job titles or new classifications.”

For reasons stated below, it is my opinion that the powers of your board on this second appeal are co-extensive with the powers of the Director of Personnel and Standardization in connection with the first appeal. It is therefore necessary to determine the powers of the director on such first appeal.

The provisions creating the right of appeal to the Director of Personnel and Standardization are contained in § 19. These provisions are as follows:

¹ Page 74, *supra*.

" . . . if . . . any employee objects to his classification, reclassification, allocation or reallocation . . . he shall have the right to appeal such classification, reclassification, allocation or reallocation to the director of personnel and standardization who shall render a decision on said appeal . . . [which appeal] shall be effected in accordance with the provisions of paragraph (5) of said section forty-five . . . "

Upon such appeal, in my opinion, the director has the power to create new job titles or new classifications, which "shall be effected" in accordance with G. L. c. 30, § 45 (5). The director has the power to create new classes and titles. G. L. c. 30, § 45 (1) (d). It is clear, by references to "classification" in § 19 [e.g., "any amendment of a classification," "the said director may classify or reclassify any office or position"], that the Legislature intended the Director of Personnel and Standardization to exercise, in appropriate cases on appeals by employees, his right to create a new classification. The word "classification" includes the creation of a new class or classification or title. G. L. c. 30, § 45 (9). *Gediman v. Commissioner of Public Works of Boston*, 331 Mass. 658, 661-662. But this right of the director to create a new classification or new job title is restricted, for the purposes of this appeal under § 19, so that it "shall be effected" only in accordance with § 45 (5). One of the provisions of paragraph (5) is that no action by the director with reference to a permanent position "shall be effected, unless and until . . . (d) it shall have been included in a schedule of permanent offices and positions approved by the joint committee on ways and means"

In my opinion, the Personnel Review Board, created by § 19A, has the same power, subject to the same restraint, that the director has. It is provided in § 19 that "any employee aggrieved by the decision of the director . . . may . . . appeal to the personnel review board" The Personnel Review Board is given power to hear appeals by the second paragraph of § 19A, which states as follows:

"Said board shall hear all appeals as if said appeals were originally entered before it. Its decisions shall be effective as of the effective date of this act and shall be effected in accordance with the provisions of paragraph (5) (d) of section forty-five of chapter thirty of the General Laws."

There is nothing in the statute to indicate that the power of the Personnel Review Board, on the second appeal, is less than the power of the director on the first appeal. The broad and unqualified language that your board shall hear all appeals "as if said appeals were originally entered before it," seems to mean that your board has as full powers as the director had on the first appeal. In *Ullian v. Registrar of Motor Vehicles*, 325 Mass. 197, 198-199, our court stated that a similar "appeal," from a decision of the Registrar of Motor Vehicles, to the Department of Public Works, was unrestricted.

"The word 'appeal' as appearing in the statute, G. L. (Ter. Ed.) c. 90, § 28, comprehends all rulings and decisions of the registrar by which the holder of the license claims to be aggrieved. The word is used in its ordinary sense as providing for a new trial on all issues and a full hearing on the merits in no way limited or restricted by what had occurred at the previous hearing before the registrar."

For the above reasons, in my opinion, the Personnel Review Board, es-

tablished by and acting under § 19A of St. 1956, c. 729, is authorized to make decisions for the creation of new job titles or new classifications. However, such new job titles or new classifications "shall be effected" only in accordance with G. L. c. 30, § 45 (5) (d), which requires that such new job titles or new classifications "shall have been included in a schedule of permanent offices and positions approved by the joint committee on ways and means. . . ." In effect, your decision establishing a new job title or new classification is a recommendation to the Joint Committee on Ways and Means for the creation or approval of such new title or classification. If and when so approved, your decision has retroactive effect to October 1, 1956, the effective date of St. 1956, c. 729.

Very truly yours,

GEORGE FINGOLD, *Attorney General*,

BY LOWELL S. NICHOLSON,
Assistant Attorney General.

Zoning Ordinance — Assignment of Dump Site to Single Family Residence Area.

JUNE 10, 1957.

SAMUEL B. KIRKWOOD, M.D., *Commissioner of Public Health*.

DEAR SIR:— You have requested the opinion of this department as to the legality of the assignment of a dump site in the city of Beverly in an area zoned for single residences.

The board of health of the city of Beverly, acting under the provisions of G. L. c. 111, § 150A, added by St. 1955, c. 310, assigned as a site for a city dump a location in an area which was zoned for single residences. Parties aggrieved appealed to the State Department of Public Health, under the terms of said § 150A, and your department has held a public hearing upon such appeal. Following this hearing, your department found as a matter of fact that "the site assigned by the board of health for a dump in Beverly is the best for the purpose of any site thus far proposed." However, your department has delayed the final decision on this appeal because of doubt as to the legality of the assignment of a dump site in an area zoned for single residences. Your request for an opinion is as follows:

"The Department of Public Health hereby requests your opinion as to whether or not the assignment by the board of health of Beverly of a site for a dump in an area zoned for single family residence is a legal assignment under the provisions of G. L. c. 111, § 150A."

I answer your question in the negative. In my opinion, under our statutes, and the zoning ordinance in the city of Beverly, a city dump cannot be assigned in an area zoned for single family residences.

We are faced, at the beginning of a consideration of this problem, with two clear propositions. (1) The zoning ordinance of the city of Beverly, by § 2, prohibits a city dump in single residence districts. This prohibition is not set forth specifically in terms of a city dump, but the use of premises which are permitted and the specific prohibition of any other uses, make it clear that the use of premises in a single residence district for a city dump

is prohibited. (2) The assignment of the site for a city dump was made in this case by the board of health acting under the authority of G. L. c. 111, § 150A. That section states clearly that an assignment of a site for a dump can be made by a board of health only subject to the provisions of any existing zoning ordinance. In fact, under § 3 of St. 1955, c. 310, by which said § 150A was added to our General Laws, the assignment of a city dump to a site in violation of the local zoning ordinance shall be deemed to be a violation of said § 150A.

In support of the assignment made by the board of health of the city of Beverly, it is contended that the literal provisions of the zoning ordinance in question prohibit the assignment of a city dump in any part of the entire city, and that this unqualified prohibition is arbitrary and unreasonable, and therefore that the zoning ordinance cannot constitutionally be applied to prevent the use of premises for a city dump. To meet this constitutional objection, it is urged that an unexpressed exception must be read into the zoning ordinance exempting city dumps from its scope.

There are several answers to the above contention. A city dump may be permitted in industrial districts under § 8, Item (31), of the zoning ordinance, with the approval of the board of appeal. Even though it were ruled that the Beverly zoning ordinance prohibited the location of a city dump anywhere within the city, the consequences of this prohibition could be avoided by building an incineration plant (§ 8, Item 18), or by contracting for disposal of refuse outside the city. Also, the consequences of an alleged total prohibition in the existing zoning ordinance could be avoided by amending the zoning law, or obtaining due approval of a variance or exception to it.

The exigencies of the present situation, in my opinion, do not call for the adoption of the rare rule of judicial construction of an unexpressed exception to the zoning law exempting city dumps from its scope. While the present situation seems stronger than that relating to cemeteries in the city of Beverly, in *Foster v. Mayor of Beverly*, 315 Mass. 567, 570, I believe the conclusion of that case supporting the zoning ordinance should be followed in the present case. Furthermore, while it is true that the total and positive prohibition of a city dump anywhere within the city, if that should be the correct interpretation of the Beverly zoning ordinance, would be considered unreasonable and possibly arbitrary, it is equally unreasonable to suggest a correction for this situation by permitting a city dump to be located within the single residence district, the district which has been most strictly protected. The facts presented in this case, in my opinion, do not overcome the clear prohibition by the zoning ordinance of a city dump in the single residence district, nor the positive provision in G. L. c. 111, § 150A, which was adopted by the Legislature in 1955, that the assignment by a board of health of a dumping ground is subject to the provisions of the existing zoning ordinance. These laws can be fully and reasonably enforced, with the city of Beverly still retaining its right to amend its zoning law, or to obtain a variance, or to dispose of its rubbish or refuse by other methods than a city dump.

Very truly yours,

GEORGE FINGOLD, Attorney General.

By LOWELL S. NICHOLSON,
Assistant Attorney General.

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